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UNITED STATES REPORTS

VOLUME 226

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1912

CHARLES HENRY BUTLER

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.
HORACE HARMON LURTON, ASSOCIATE JUSTICE.
CHARLES EVANS HUGHES, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
JOSEPH RUCKER LAMAR, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.

GEORGE WOODWARD WICKERSHAM, ATTORNEY GENERAL.
FREDERICK W. LEHMANN, SOLICITOR GENERAL.[2]
WILLIAM MARSHALL BULLITT, SOLICITOR GENERAL.[3]
JAMES HALL McKENNEY, CLERK.
JOHN MONTGOMERY WRIGHT, MARSHAL.

[1] For allotment of THE CHIEF JUSTICE and Associate Justices among the several circuits see next page.

[2] Resigned July 15, 1912.

[3] On July 1, 1912, President Taft nominated William Marshall Bullitt of Kentucky as Solicitor General to succeed Frederick W. Lehmann of Missouri, resigned. He was confirmed by the Senate July 13, 1912. His commission was filed October 15, 1912. He resigned March 11, 1913.

135385

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, MARCH 18, 1911.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Charles E. Hughes, Associate Justice.

For the Third Circuit, Mahlon Pitney, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, Joseph R. Lamar, Associate Justice.

For the Sixth Circuit, William R. Day, Associate Justice.

For the Seventh Circuit, Horace H. Lurton, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For previous allotment see 222 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1912.

BREESE AND DICKERSON *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 476. Argued October 15, 1912.—Decided October 28, 1912.

An indictment duly found by the Federal grand jury, while in session in a room adjoining the court room with a door opening into the court room, and which is presented in the manner prescribed by the law of the State to the presiding judge in open court while the jurors are still in session and able to see the actions of the foreman, is not void because the grand jury did not in a body accompany the foreman into the court room.

An objection that an indictment was not, under such circumstances, duly presented and publicly delivered, should be taken at the first opportunity and is lost by failure to do so; nor is it saved by permission given, when pleading not guilty, to take advantage upon motion in arrest of judgment of all matters that can be availed of on motion to quash or demurrer.

An order of the court saving rights to one pleading to an indictment does not create new rights.

Section 1025, Rev. Stat., indicates a policy that technical objections to an indictment not presented at the first opportunity are waived and should be construed as extending to the objection raised in this case, the same not being based on a constitutional right.

THE facts, which involve the validity of an indictment for conspiracy under § 5440, Rev. Stat., are stated in the opinion.

Mr. Charles A. Douglas, with whom *Mr. John S. Adams*, *Mr. Thomas Ruffin*, *Mr. James H. Merrimon*, *Mr. Gibbs L. Baker* and *Mr. Hugh H. Obear* were on the brief, for defendants:

The indictment was absolutely void.

The entire grand jury must return an indictment in open court, otherwise it is void, and the court has no jurisdiction to try the accused.

This is the common-law doctrine and was the law at the time of the adoption of the Constitution. 4 Blackstone, 306; Bishop, New Crim. Law, § 869 A; Thompson and Merriam on Juries, § 696; *Commonwealth* v. *Cawood*, 2 Va. Cas. 541; *State* v. *Heaton*, 22 W. Va. 778; *White's Case*, 29 Gratt. 824; *Simmons' Case*, 89 Virginia, 156; *Price's Case*, 21 Gratt. 846; *Gardner* v. *People*, 20 Illinois, 430; *Renigar* v. *United States*, 172 Fed. Rep. 646; *Goodson* v. *State*, 29 Florida, 511.

This was the law of the State of North Carolina. *State* v. *Cox*, 28 Nor. Car. 445; *State* v. *Bordeaux*, 93 Nor. Car. 563.

It was the law of North Carolina until the year 1889, when a statute was required to change it. See § 3262, Revisal of North Carolina.

The crime with which the defendants were charged is that of conspiracy under § 5440, Rev. Stat. U. S., and is an infamous crime. 2 Fed. St. Ann. 247; *Mackin* v. *United States*, 117 U. S. 348.

Accordingly this became the law of the Constitution of the United States by adoption, under the Fifth Amendment.

"Due process of law" at the time of the adoption of the Constitution comprehended the proceedings as then known, including the return of the indictment by the whole body of the grand jury. See authorities heretofore cited and *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *Hagar* v. *Reclamation District*, 111 U. S.

701; *Ex parte Wall*, 107 U. S. 265; *Lowe* v. *Kansas*, 163 U. S. 81; *Lewis* v. *United States*, 146 U. S. 370; *Hopt* v. *Utah*, 110 U. S. 578; and see *Schwab* v. *Berggren*, 143 U. S. 442; Cooley's Const. Law, 241; McGehee on Due Process of Law, 1 and 51; *Hallinger* v. *Davis*, 146 U. S. 314; *Hurtado* v. *California*, 110 U. S. 516.

It follows, therefore, that as the United States has passed no statute on the subject, and as § 34, Judiciary Act of 1789, § 721, Rev. Stat., is not applicable thereto, due process of law is the same now as it was at common law or in the State of North Carolina at the time of the adoption of the Constitution. *United States* v. *Reid*, 12 How. 341.

The Federal Government cannot vary the procedure in trials by jury in Federal courts, so as to enlarge or diminish the number of jurors or require less than their unanimous verdict, and cannot enact any statute which shall operate to merge the jurisdictions of law and equity, and the words "due process of law," although they may be properly subject in their construction to the growth of the law, demand that the changes in the law to which they are so subjected be made by properly constituted Federal authorities before being enforced by Federal courts.

It became a constitutional right or privilege of the accused to be placed on trial only after an indictment presented in open court by at least twelve of the grand jurors.

A North Carolina statute could not affect Federal constitutional law nor the constitutional privilege of the accused. *Erwin* v. *United States*, 37 Fed. Rep. 488; *Trafton* v. *United States*, 147 Fed. Rep. 514; *Logan* v. *United States*, 144 U. S. 263; *Martin* v. *Hunter*, 1 Wheat. 363; *McCullough* v. *Maryland*, 4 Wheat. 316.

The failure of the grand jury as a body to return the indictment was not a matter of form only to be cured by § 1025, Rev. Stat., nor could any waiver of the accused

affect their constitutional right or confer jurisdiction upon the court. See 1 Bishop's New Crim. Proc.; *United States* v. *Gale*, 109 U. S. 65; Fed. Stat. Ann. § 12, p. 263; Joyce on Indictments, § 31; *Ex parte McCluskey*, 40 Fed. Rep. 74; *Renigar* v. *United States*, 172 Fed. Rep. 646, 655; *Lewis* v. *United States*, 146 U. S. 370.

Such an indictment may be quashed on motion of the defendants first made after the expiration of the term at which the indictment was found and after the final discharge of the grand jury which found it, the defendants not having at or before the time of moving to quash pleaded to said indictment. *Crowley* v. *United States*, 194 U. S. 462, citing *McQuillen* v. *State*, 8 Smeedes & M. 587.

While in the certificate the court below refers to the pleading as a motion to quash, the point was made in the trial court by plea in abatement, although under the practice prevailing in said court a motion to quash would have amounted to a plea in abatement, the ancient distinction between the two having been ignored. *Breese* v. *United States*, 143 Fed. Rep. 252.

A plea based upon the ground that no valid indictment was in court is one to the jurisdiction, for the accused thereby denies the jurisdiction of the court to try him. Starkie on Criminal Pleading, 342.

A motion or plea of the character mentioned in the second question may be made at any time before the accused is required to plead in bar. 12 Cyc. and cases cited.

The sixth question should be answered affirmatively.

The trial court in its discretion would have the right to permit the second plea or motion to be made, either as a new motion or by way of amendment, and having done so in this case, and having found the facts therein raised, and having decided as a matter of law upon those facts that the indictment was valid, the question as to whether it was proper to consider the points so raised has been foreclosed; and the only question left for the

appellate court at this time to determine is whether or not on the facts found the indictment as a matter of law was valid. *State* v. *Eason*, 70 Nor. Car. 88; *State* v. *Jones*, 88 Nor. Car. 671; *State* v. *Sheppard*, 97 Nor. Car. 410; *State* v. *Miller*, 100 Nor. Car. 543; *State* v. *Gardner*, 104 Nor. Car. 739; *Mills* v. *State*, 76 Maryland, 277; *Commonwealth* v. *Smith*, 162 Massachusetts, 508; *Mentor* v. *People*, 30 Michigan, 91; *People* v. *Judson*, 11 Daly (N. Y.), 47; *Comus* v. *Ransey*, 1 Brews. (Pa.) 422; *Richards* v. *Commonwealth*, 81 Virginia, 110.

Mr. Assistant Attorney General Denison, with whom *Mr. Louis G. Bissell* was on the brief, for the United States.

No Federal statute required the grand jury to accompany the foreman upon presentation of the indictment, nor had any Federal decision established that practice as essential. The decision in *Renigar* v. *United States*, 172 Fed. Rep. 646, that an indictment was absolutely void where it was subject to the present objection was coupled with the further objection that it was not returned into court at all, but merely handed to the clerk during a recess. The grand jury and the court to which the indictment was submitted committed no error in following the state code practice. Laws North Carolina, 1905, § 3242; Mr. Justice Gray in *United States* v. *Richardson*, 28 Fed. Rep. 66; *Danforth* v. *State*, 75 Georgia, 614, p. 620. The reasons for the old practice have largely disappeared. *Frisbie* v. *United States*, 157 U. S. 160. And it has been abrogated not only in North Carolina but in Ohio, Laws 1869, p. 300, Title III, § 86, and in Nebraska, Laws 1873, G. S., p. 816, as well as in Georgia.

The objection does not go to the jurisdiction of the trial court, but is purely technical and involves no prejudice to the defendants. It is therefore no ground for quashing the indictment. Rev. Stat., § 1025; *Frisbie* v. *United*

States, 157 U. S. 160; *Caha* v. *United States*, 152 U. S. 211, 221; *Bram* v. *United States*, 168 U. S. 532, 566; *Ledbetter* v. *United States*, 108 Fed. Rep. 52; *United States* v. *Clark*, 46 Fed. Rep. 633, 638; *United States* v. *Borneman*, 35 Fed. Rep. 824; *United States* v. *Molloy*, 31 Fed. Rep. 19; *United States* v. *McKee*, 4 Dillon, 1, 10; *United States* v. *Cobban*, 127 Fed. Rep. 713, 716; *United States* v. *Benson*, 31 Fed. Rep. 896, 900; *United States* v. *Tuska*, 14 Blatchf. 5; *United States* v. *Ewan*, 40 Fed. Rep. 453; *United States* v. *Terry*, 39 Fed. Rep. 355, 364; *Texas & Pacific Ry. Co.* v. *Kirk*, 111 U. S. 486; *Miller* v. *Texas*, 153 U. S. 535; *Long* v. *Farmers' State Bank*, 147 Fed. Rep. 360; *Alaska Co.* v. *Keating*, 116 Fed. Rep. 561, 564; *Townsend* v. *Jemison*, 7 How. 706, 719; *Linder* v. *Lewis*, 1 Fed. Rep. 378, 380; *Agnew* v. *United States*, 165 U. S. 36, p. 44; *McInerney* v. *United States*, 147 Fed. Rep. 183; *Gale* v. *United States*, 109 U. S. 65; *United States* v. *Tallman*, 10 Blatchf. 21; *United States* v. *Reed*, 2 Blatchf. 435, 449; *State* v. *Mellor*, 13 R. I. 666; *Cox* v. *People*, 80 N. Y. 500; *People* v. *Petrea*, 92 N. Y. 128, 143; *State* v. *Mertens*, 14 Missouri, 94; *Wau-Kon-Chaw-Neek-Kaw* v. *United States*, 1 Morris, 332, 335–336; *Danforth* v. *State*, 75 Georgia, 614, 620; *Bryan* v. *Ker*, 222 U. S. 107; *Kaizo* v. *Henry*, 211 U. S. 141, 149; *Harlan* v. *McGourin*, 218 U. S. 442, 451; *Agnew* v. *United States*, 165 U. S. 36, 44.

The motion to quash was made too late, the rule requiring that such motions must be made at the very first opportunity. *Agnew* v. *United States*, 165 U. S. 36, 44; *Hyde* v. *United States*, 225 U. S. 347, 373; *Lowdon* v. *United States*, 149 Fed. Rep. 673; *McInerney* v. *United States*, *supra*; *Gale* v. *United States*, 109 U. S. 65; *Crowley* v. *United States*, 194 U. S. 461; *Kerr* v. *State*, 36 Oh. St. 614, 623; *Jinks* v. *State*, 5 Tex. App. 68; *Caldwell* v. *State*, 41 Texas, 86, 91; *Douglass* v. *State*, 8 Tex. App. 520, 529; *State* v. *Mann*, 83 Missouri, 589, 592; *Patterson* v. *Commonwealth*, 86 Kentucky, 313; *Ex parte Winston*, 52

Alabama, 419; 1 Bishop, Crim. Proc., § 886; 12 Cyc. 766; *State* v. *Ledford*, 133 Nor. Car. 714; *Powers* v. *United States*, 223 U. S. 303, 312; *Re Wilson*, 140 U. S. 575; *Carter* v. *Texas*, 177 U. S. 442; *In re Lane*, 135 U. S. 443; *Louisiana* v. *Gibson & Dillon*, 50 La. Ann. 23.

The order of court alleged to have authorized the motion notwithstanding the delay of 11½ years was intended to do no more, and did no more, than waive the effect of the plea of not guilty, so far as that plea would obstruct a motion otherwise duly made. If the order is to be construed otherwise and as if intended to relieve the defendant from the rules of law established in the premises, then the order was beyond the power of the court and void. *Kelsey* v. *Forsyth*, 21 How. 85; 1 Bishop, Crim. Proc., § 124; *Murphy* v. *People*, 3 Colorado, 147; *Spencer* v. *State*, 34 Tex. Crim. Rep. 238; *In re Brown*, 174 Fed. Rep. 339; *Spalding* v. *Hill*, 115 Kentucky, 1; *Whiskey Cases*, 99 U. S. 594; *United* v. *Hinz*, 35 Fed. Rep. 272, 279; *Queenan* v. *Oklahoma*, 190 U. S. 548, 552.

In any event the objection did not survive the first motion to quash in which the finding and return of the indictment were conceded and this objection was not taken. *People* v. *Strauch*, 153 Ill. App. 544, 554.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on a certificate which may be summed up as follows. The defendants were indicted in 1897 under Rev. Stat., § 5440, for a conspiracy to embezzle funds of a national bank. In the following term, on November 6, 1897, they were ordered to plead, and pleaded not guilty—but the order provided that the plea should not "prevent their taking advantage upon motion in arrest of judgment or on motion for a new trial of all matters and things which could be taken advantage of by motion to quash or demurrer, upon motion in arrest of

judgment or for a new trial, all such matters and things shall be heard and determined as if the same were being heard upon motion to quash or demurrer." After the trial of another case this one was called for trial at the May term, 1908. The defendants then pleaded in abatement and moved to quash on the ground of the disqualification of three grand jurors, but the plea and motion were not maintained by the facts. 172 Fed. Rep. 761. The case was put down for trial again on June 21, 1909. The defendants again pleaded in abatement and moved to quash on the ground that the foreman of the grand jury delivered the indictment to the judge during the session of the court but in the absence of the other grand jurors. The court denied the plea and overruled the motion. A jury was sworn, the defendants were tried, and found guilty, and after a motion for a new trial had been made on the same ground as above, and overruled, they were sentenced. 172 Fed. Rep. 765, 768. The question is whether the last mentioned plea and motions should have been sustained.

The facts are "that more than twelve grand jurors voted to find the indictment a true bill. That when this action had been taken the grand jury was in session in a room adjoining the court room on the same floor with a door opening into the court room. The foreman left the grand jury, went into the court room with the bill of indictment, and handed it to Judge Purnell, the presiding judge, in person, the judge being then on the bench and the court open, and that the judge looked over the indictment and handed it to the clerk in open court, and that the foreman then returned to the grand jury room and proceeded with the business of the grand jury there assembled; that the grand jury did not accompany him when he brought the bill of indictment into the court room and handed it to the court." The mode of proceeding was the same as that prescribed by the laws of North Carolina. The clerk filed

the indictment and made the following entry: "United States *v.* W. E. Breese, W. H. Penland, and J. E. Dickerson. Indct.: Conspiracy and embezzlement, Oct. term, 1897. 'A true bill. J. M. Allen, foreman.' In the above entitled cause it is ordered by the court, upon motion of the district attorney, that the said cause, together with all the papers therein, be transferred to Asheville, to be there tried at the next term of said court to be held on the 1st Monday in November next."

Six questions are certified, which are intended to present in detail whether in the circumstances stated the indictment should have been quashed.[1] It is enough to

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[1] 1. Is such an indictment absolutely void?

2. Should such indictment be quashed on motion of the defendants first made after the expiration of the term at which the indictment was found and after the final discharge of the grand jury which found it, the defendants not having at or before the time of moving to quash pleaded to said indictment?

3. Should such indictment be quashed on motion of the defendants first made after the expiration of the term at which the indictment was found and after the final discharge of the grand jury which found it, and after the overruling of an earlier verified motion to quash made by the defendants on other grounds, in which said earlier motion to quash they had alleged that said indictment had been duly returned into open court by the grand jury, said second motion to quash having been made before the defendants had otherwise pleaded to the indictment?

4. Should such indictment be quashed on motion of the defendants first made after the expiration of the term at which the indictment was found, and after the final discharge of the grand jury which found it, and after the defendants had pleaded not guilty to such indictment, but before a jury was sworn upon the issue joined upon such plea?

5. Would the defendants be entitled to have judgment arrested upon a verdict of guilty returned upon such indictment?

6. Would defendants who had pleaded not guilty to such an indictment under an order of court, by the terms of which such plea of not guilty should not operate or have the effect to prevent their taking advantage upon motion in arrest of judgment or on motion for a new trial of all matters and things which could be taken advantage of by

say that we are of opinion that the indictment was not void, and that if there ever was anything in the objection to it the plea and motion came too late.

We do not think it necessary to discuss the contention that the Fifth Amendment to the Constitution requires the indictment to be presented by the grand jury in a body, or that their failure so to present it goes to the jurisdiction of the court. See *Kaizo* v. *Henry*, 211 U. S. 146, 149; *Harlan* v. *McGourin*, 218 U. S. 442, 451; *United States* v. *McKee*, 4 Dillon, 1, 9. The reasons for the requirement, if they ever were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the State of North Carolina, could have done away with it, if it had seen fit to do so instead of remaining silent. See *Danforth* v. *State*, 75 Georgia, 614, 620, 621. *United States* v. *Butler*, 1 Hughes, 457, 461. *Frisbie* v. *United States*, 157 U. S. 160, 163. But it would be going far to say that the record does not import an indictment duly presented and 'publicly delivered into court,' 4 Bl. Comm. 306, or that on the findings the indictment was not only presented in fact, even according to the supposed rule requiring the presence of all the grand jurors. It appears by a certified plan that they could have seen the foreman's actions, if they desired, from at least a part of the room where they were. It fairly is implied that they knew what the foreman was about. We may compare the decisions as to the witnessing of wills. *Riggs* v. *Riggs*,

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motion to quash or demurrer, be entitled to have such indictment quashed on motion made by them after the expiration of the term at which the indictment had been found and after the final discharge of the grand jury which found it, and after the denial by the court of a previous motion to quash made by the defendants on other grounds, in which first motion to quash they had alleged that said indictment had been duly returned into open court by the grand jury?

135 Massachusetts, 238. *Mendell* v. *Dunbar*, 169 Massachusetts, 74.

At all events, objections of this sort are not to be favored when no prejudice to the defendants is shown; and on the contrary the fact that the indictment was found and presented to the court is not disputed. As the defendants had no constitutional right to the presence of the grand jury they were bound to take the first opportunity in their power to object to its absence, and by their failure to do so, as heretofore set forth, they lost whatever rights they may have had. *United States* v. *Gale*, 109 U. S. 65. *Agnew* v. *United States*, 165 U. S. 36, 44. *Hyde* v. *United States*, 225 U. S. 347, 373. The rule is implied in *Crowley* v. *United States*, 194 U. S. 461, 474, cited by the defendants. See also *Rodriguez* v. *United States*, 198 U. S. 156, 164. The order made by the court saving rights created no new ones, and the right to this plea was lost irrespective of the plea of not guilty, entered in pursuance of the order of the court. In the first plea it was admitted that the grand jury 'returned the said bill of indictment into court as a true bill.'

The same result follows from Rev. Stat., § 1025, providing that no indictment presented by a grand jury shall be deemed insufficient nor the trial, judgment or other proceeding thereon be affected by any defect in matter of form only, which shall not tend to the prejudice of the defendant. As we already have intimated, this indictment was presented in fact by the grand jury, and the defect, if any, was a defect in the matter of form only. The section should be construed to apply to the case (see *Crowley* v. *United States*, 194 U. S. 461, 474, *Rodriguez* v. *United States*, 198 U. S. 156, 165, *United States* v. *Molloy*, 31 Fed. Rep. 19, 23), and, even if it did not, it indicates a policy favoring the conclusion previously expressed that the objection had been waived. We answer the first and sixth questions: No.

MONSIGNOR HARTY *v.* MUNICIPALITY OF VICTORIA.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 13. Argued October 30, 1912.—Decided November 11, 1912.

A suit to recover real estate, like an ordinary action at law, can only be brought to this court from the Supreme Court of the Philippine Islands by writ of error; it cannot be brought by appeal.

Where, as in this case, there is no question of law, this court cannot, on writ of error, review the finding of the Supreme Court of the Philippine Islands that the preponderance of contradictory evidence was on the defendant's side.

Quære whether in this case the jurisdictional amount of $25,000 was involved.

Appeal from and writ of error to review 18 Phil. Rep. 600, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from, and error to, the Supreme Court of the Philippine Islands, are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Henry W. Van Dyke* was on the brief, for appellant and plaintiff in error.

Mr. Felix Frankfurter for appellee and defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the Archbishop of Manila to recover a square in the Municipality of Victoria. The church of the town and its parish house stand in this square and they are admitted to be church property, but the land not occupied by them was declared by the Supreme Court to constitute the public square or plaza

of the town, devoted to public uses. The plaintiff brought a writ of error and appealed. The appeal must be dismissed. *Jover* v. *Insular Government*, 221 U. S. 623, 635. *Cariño* v. *Insular Government*, 212 U. S. 449, 456. The suit is like an ordinary action at law, and can be brought to this court only by writ of error, as was done in *Santos* v. *Roman Catholic Church*, 212 U. S. 463, and *Ker* v. *Couden*, 223 U. S. 268.

There is a motion to dismiss the writ of error also, on the ground that the value of the real estate in controversy does not exceed $25,000. Affidavits to that effect are offered, and the order allowing the writ purports to do so on affidavits of the plaintiff and two others, "notwithstanding the fact that by admission of counsel for plaintiff, it appears that the value of the parcel of land for which judgment was rendered in favor of the defendant municipality, exclusive of the value of the adjoining parcel of land with the church and convent situated thereon, title to which is recognized to be in the plaintiff, and damages thereto resulting from the aforesaid judgment, does not exceed twenty-five thousand dollars." We doubt whether the affidavits do not imply the same admission, and whether the action should not be dismissed on that ground. The affidavit of the plaintiff puts the value of the land in controversy at over $25,000 on the manifestly untenable ground that the church edifices are deprived of free egress and ingress by the decision, and the others seemingly mean that the parcel of land with the church buildings included is worth thirty thousand dollars, the buildings being valued at twenty-five thousand dollars—leaving five thousand dollars for the land in dispute.

But the result is the same if we go further. The evidence was contradictory, and although we were invited to consider it on the one side in the light of the relation of the church to the community and on the other in that of the custom by which the plaza is of the essence of a

town, we can do neither. There is no question of law before us—for it hardly was argued, and could not be with any seriousness, that the Supreme Court was not authorized to review the evidence under § 497 of the Philippine Code, or that this court can consider whether it was right in finding the preponderance of evidence to be on the defendant's side.

Appeal and writ of error dismissed.

UNITED STATES, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 648. Argued October 25, 28, 1912.—Decided November 11, 1912.

Under § 7 of the act of June 18, 1910, 36 Stat. 539, 547, c. 309, the Interstate Commerce Commission cannot require a main trunk road to make switch connections with a road which is not actually at the time a lateral branch road.

In this case *held*, that a railroad parallel with a main trunk line and operated by a traction company as an independent venture and not as a mere feeder was not a lateral branch railroad within the meaning of § 7 of the act of June 18, 1910.

An order to maintain through rates incident to a requirement to make switch connections is incidental thereto and falls with it.

Quære whether parties are bound in a higher court by findings based on specific investigations made by the lower tribunal without notice. See *Oregon R. R. Co.* v. *Fairchild*, 224 U. S. 510, 525.

195 Fed. Rep. 962, affirmed.

THE facts, which involve the jurisdiction of the Interstate Commerce Commission to require carriers to establish switch connections, are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States and *Mr. Charles W. Needham* for Interstate Commerce Commission, appellants:

The words "lateral branch line" as used in the American statutes prior to their adoption by Congress would have permitted either of the railroad lines to construct this traction line under charters authorizing their construction of "lateral branch lines." *Newhall* v. *Galena &c. R. R.*, 14 Illinois, 273, 274; *McAboy's Appeal*, 107 Pa. St. 548, 557; *Vollmer* v. *Schuylkill &c. Ry. Co.*, 115 Pa. St. 166; *B. & O. R. R.* v. *Waters*, 105 Maryland, 396; *Greenville & Hudson Ry. Co.* v. *Grey*, 62 N. J. Eq. 768, 770; *Florida &c. R. Co.* v. *Pensacola &c. R. Co.*, 10 Florida, 145, 165, 169; *Blanton* v. *Richmond &c. R. R.*, 86 Virginia, 618; *Wheeling Bridge Co.* v. *Camden Oil Co.*, 35 W. Va. 205; *Howard County* v. *Bank*, 108 U. S. 314.

The purpose of Congress in providing for switch connection with "lateral branch lines" was to provide an outlet for shippers who were dependent upon such outlet for reasonable access to the main arteries of interstate commerce. *I. C. C.* v. *D., L. & W. R. R. Co.* (*Rahway Case*), 216 U. S. 531. So long as the traction line in its dominant and principal character served shippers to whom the track connection was necessary to give them such an outlet into interstate commerce, it was a "lateral branch line" within the meaning of Congress. This conclusion of fact was found by the Commission not only from the geographical situation but from the commercial and industrial situation and the distribution of the population.

The order did not lack the technical prerequisites as to proper parties and prior formal request in writing. Act to Regulate Commerce, § 13, as amended June 18, 1910.

The order is not invalid because it did not require the Traction Company to furnish security for the expense of installing the switch connection. *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, 302; *State* v. *Chi., M. & St. P. Ry. Co.*, 115 Minnesota, 51, 53; *State* v. *C., B. & Q. R. R.*, 85 Kansas, 649; *O. R. & N. Co.* v. *Fairchild*, 224 U. S. 510.

The order compelling through routes was constitutional and within the Commission's statutory power. Act to Regulate Commerce, § 15; *Burlington &c. Ry.* v. *Dey*, 82 Iowa, 312, 338; *State* v. *Minn. & St. L. R. Co.*, 80 Minnesota, 191, 196; *Jacobson* v. *Wis. &c. Ry.*, 71 Minnesota, 519.

Neither the order nor the act required the petitioners to send their own cars beyond their own rails. *Central Stock Yards* v. *L. & N. R. R. Co.*, 192 U. S. 568, 571; *Burlington &c. Ry.* v. *Dey, supra;* 82 Iowa, 312, 338; *Rae* v. *Grand Trunk R. Co.*, 14 Fed. Rep. 401; *Mackin* v. *B. & A. R. Co.*, 135 Massachusetts, 201, 206; *Peoria &c. Ry.* v. *C., R. I. & P. R. Co.*, 109 Illinois, 35; *Hudson Valley Ry.* v. *B. & M. R. Co.*, 106 App. Div. (N. Y.) 375; *Mich. Cent. R. Co.* v. *Smithson*, 45 Michigan, 212; Service Companies, §§ 529, 530; *Mo. Pac. R. R.* v. *Larrabie Mills*, 211 U. S. 612; *Penn. Ref. Co.* v. *West N. Y. & P. R. Co.*, 208 U. S. 208, 222; *Cent. Stock Yards* v. *L. & N. Ry.*, 192 U. S. 568, 572.

The order is not void because, as to the physical condition of the Traction Company's line, the Commission supplemented the testimony of witnesses by independent investigation. This independent investigation was justified on the same ground as supports the right of a jury to "view" the subject-matter in controversy. *Cederberg* v. *Robison*, 100 California, 93; Sutherland on Damages, § 441, note, 1; Wigmore on Evidence, §§ 1150, 1168; *People* v. *D. & H. Canal Co.*, 165 N. Y. 362, 365.

However, judicial analogy should not control because of the importance of the Commission's administrative functions. *I. C. C.* v. *Baird*, 194 U. S. 25; *Boston Fruit & Produce Exchange* v. *N. Y. &c. R. Co.*, 4 I. C. C. Rep. 664, 678; Daish on Procedure before the I. C. C., §§ 137, 132, 136, 144; *M. & K. Shippers Assn.* v. *M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 483, 484; *Origet* v. *Hedden*, 155 U. S. 228, 237; *Tang Tun* v. *Edsell*, 223 U. S. 673, 677; *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 342; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *West* v. *Hitchcock*, 205 U. S. 80; *Davidson* v. *New Orleans*, 96 U. S. 97.

In determining questions of fact arising under the Act to Regulate Commerce, the conclusions of the Commission are final and not reviewable by the Commerce Court. *Balt. & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481; *Int. Com. Comm.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 251.

Mr. R. Walton Moore, *Mr. Edward Barton* and *Mr. Theodore W. Reath*, with whom *Mr. Joseph I. Doran* and *Mr. F. Markoe Rivinus* were on the brief, for appellees.

Mr. C. B. Matthews filed a brief for the appellant, Cincinnati & Columbus Traction Company.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit to set aside an order of the Interstate Commerce Commission directing the appellees to establish switch connections with the road of the appellant and also through routes to and from points on that road.

20 I. C. C. Rep. 486. The Commerce Court made a decree as prayed, 195 Fed. Rep. 962, and an appeal was taken to this court. The facts material to our decision are as follows. The Baltimore and Ohio Southwestern Railroad and the Norfolk and Western Railway are trunk lines of steam railroads running east and west across the State of Ohio. After almost touching each other at Norwood, a suburb of Cincinnati, they draw apart, the former in a northerly, the latter in a southerly direction, but come together again at Hillsboro about fifty-three miles further to the east. The line of the Traction Company is an 'interurban' electric railway, for passengers and some freight, running under a state charter between Norwood and Hillsboro through the middle of the diamond enclosed by the steam roads, and authorized to go on to Columbus. For a number of miles easterly from Norwood to Stonelick, near Boston, the last mentioned road is very near and almost parallel to the tracks of one or the other of the steam roads, as it is again for the last five miles before reaching Hillsboro. In the intervening space, between Boston and Dodsonville, the towns and villages on the electric line are from five to ten or twelve miles by wagon distant from the nearest station on one of the steam roads. The Traction Company applied to the Commission for switch connections and they were ordered as we have said.

Some technical objections were raised, but the substantial question is whether the Traction Company is a "lateral, branch line of railroad" within the meaning of the first section of the Act to Regulate Commerce, amended by act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 547. That section requires carriers subject to the act to establish switch connections with such lines on certain conditions; and, as amended, permits owners of such lines as well as shippers to make complaint to the Commission in case of the carriers' failure upon written application, and authorizes the Commission to hear, investigate and

determine whether the conditions exist, and to make an order directing the carrier to comply with the act. It will be seen without much argument that, unless the Traction Company is a lateral, branch line of railroad, the trunk line carriers, the appellees, are not subject to the requirement of the statute, so far as the Traction Company is concerned.

The words 'lateral, branch line' do not refer to what the applicant may become or be made by order of the Commission but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of lines. The most obvious examples of such lines are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment. We agree with the Commerce Court that the Traction Company is not within this class. It is an independent venture, in its general course parallel to, more or less competing with, the steam roads and working on a different plan. Presumably and so far as appears it was built and would have been run without regard to the existence of the steam roads. The cases cited on behalf of the appellants as to the power of railroad companies to construct branch roads under their charter do not apply. There the determination of the company fixes the character of the branch; it builds the branch from the beginning as incident to the purposes of the company. But here, as we have said, this determination of the Commission that the applicants shall be a branch is not enough; the applicant must be a branch before it applies. That is the absolute and reasonable condition. That some shippers would be accommodated by a switch connection is not enough.

The order to maintain through routes was incident to the requirement of switch connections and falls with it.

We understand that it was based on the assumption that the connections were to be made, and therefore do not go into the question of power under § 15.

It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, &c., to establish the switch. We remark that it is stated in the Commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. See *Washington, ex rel. Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 525. Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record and the facts thus noticed are specified, so that matters of law are saved.

Decree affirmed.

STANDARD SANITARY MANUFACTURING COMPANY *v.* UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 554. Argued October 15, 16, 17, 1912.—Decided November 18, 1912.

A trade agreement under which manufacturers, who prior thereto were independent and competitive, combined and subjected themselves to certain rules and regulations among others limiting output and sales of their product and quantity, vendees and price, *held* in this case to be illegal under the Sherman Anti-trust Act of July 2, 1890. *Montague* v. *Lowry*, 193 U. S. 38.

A trade agreement involving the right of all parties thereto to use a certain patent, which transcends what is necessary to protect the

use of the patent or the monopoly thereof as conferred by law and controls the output and price of goods manufactured by all those using the patent, is illegal under the Anti-trust Act of 1890. *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, distinguished.

While rights conferred by patents are definite and extensive, they do not give a universal license against positive prohibitions any more than any other rights do.

The Sherman Anti-trust Act is a limitation of rights which may be pushed to evil consequences and should therefore be restrained.

The character of the Sherman Act is sufficiently comprehensive and thorough to prevent evasions of its policy by disguise or subterfuge.

The Sherman Act is its own measure of right and wrong; courts cannot declare an agreement which is against its policy legal because of the good intentions of the parties making it.

A party to an agreement in restraint of trade is none the less a party to the illegal combination created thereby because it is not subject to all the restrictions imposed upon all the other parties thereto.

A corporation having a manufactory in one State and warehouses in several other States held to be engaged in interstate commerce under the circumstances of this case.

Quære, whether one of the individual defendants in an equity case brought by the Government to dissolve an illegal combination under the Sherman Act, called as a witness by one of the other defendants in the same suit, obtains immunity from criminal prosecution as to the matters testified to.

There is no rule that civil suits brought under the Sherman Act to dissolve the combination must await the trial of criminal actions against the same defendants, and whether the trial of the civil action shall be delayed because some of the defendants refuse to testify as witnesses for other defendants is a matter in the discretion of the trial court, and in the absence of abuse, not reviewable.

191 Fed. Rep. 172, affirmed.

THE facts, which involve the legality under the Sherman Anti-trust Act of July 2, 1890, 26 Stat. 209, c. 647, of a combination of manufacturers, are stated in the opinion.

Mr. Herbert Noble, with whom *Mr. Henry D. Estabrooke* and *Mr. Hartwell P. Heath*, were on the brief, for appellants other than Colwell Lead Company:

The gravamen of the Government's charge is that the scheme in this case amounted to a wicked conspiracy to circumvent the Sherman Act by basing it on a patented invention of slight or no importance which was used only as a subterfuge. Whether it is wicked to attempt to circumvent the Sherman Act depends somewhat upon the meaning of the Sherman Act as well as the meaning of the word "circumvent." Translated literally, according to its rhyme and not its reason, the Sherman Act is a blight upon enterprise. The venom of anarchy could not elaborate a more enervating, paralyzing proscription. All business would be under the ban of the law; with the result that it would be left to the caprice or favor of the Attorney-General to give immunity to favorites or punish enemies. If the Sherman Act means this, then we make bold to say that it is the righteous duty of every lawyer to circumvent the Sherman Act if it can be accomplished.

Where a man's remedy for a wrong is barred at law he does not circumvent the law if he resorts to equity. If what was done was legal, the question of motive is clearly immaterial. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *McCune* v. *Norwich Gas Co.*, 30 Connecticut, 521; *Glendon Iron Works* v. *Uhler*, 15 Am. Rep. 599; 20 Harvard Law Rev., Nos. 4, 5 and 6.

Irrespective of patent law or patent rights the acts of the defendants did not in any reasonable sense create a monopoly, restrain commerce, limit output, nor throttle competition, nor were they obnoxious to any fair reading of the Sherman Act. The rule of possible evil—that the mere power to do evil is equivalent to the actual doing of it would make potential bomb throwers of every one. In the very nature of things the law may not punish anyone for the wrong he might do if he were so disposed.

The court below erred in not decreeing that the agreements entered into by the defendants and upon which the petition is based were lawful under the patent laws of the

United States and not subject to the provisions of the Sherman Anti-trust Act.

Similar license agreements were sustained by the courts in *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. Rep. 358; *Indiana Mfg. Co.* v. *Case Threshing Mach. Co.*, 154 Fed. Rep. 365; *Goshen Rubber Works Co.* v. *Single Tube Tire Co.*, 166 Fed. Rep. 431; *Victor Talking Mach. Co.* v. *The Fair*, 123 Fed. Rep. 424; *Heaton Peninsular Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 294.

The provisions in the license agreements as to prices were intended to enable the licensees to make a reasonable profit, so that they would be able to maintain and improve the quality of the ware, and pay the royalties reserved. The owner of a patent can protect his invention by making agreements controlling the product of the use of his invention, and which admit that by the use of that invention the product is better than if made by any other known method of manufacturing the product. *Henry* v. *A. B. Dick Co.*, 224 U. S. 1.

The constitutional idea of a time monopoly in a new creation is profoundly wise, as all experience has demonstrated. The right to withhold the use of an invention necessarily involves a right to attach to its use any condition however arbitrary, for the public is none the poorer if the invention is never used, whereas it may be benefited if the invention is brought into use on any terms; and in any event the monopoly lapses with the lapse of time, or is perhaps made valueless by a newer invention inspired by the one it supersedes. Cases *supra* and *Bloomer* v. *McQuewan*, 14 How. 539, 548; *United States* v. *American Bell Tel. Co.*, 167 U. S. 224; *U. S. Consol. S. R. Co.* v. *Griffin & Skelley Co.*, 126 Fed. Rep. 364; *Rupp & Wittgenfeld Co.* v. *Elliott*, 131 Fed. Rep. 730; *New Jersey Patent Co.* v. *Schaeffer*, 159 Fed. Rep. 171; *New Jersey Patent Co.* v. *Schaeffer*, 178 Fed. Rep. 276; *Fonotipia, Ltd.*, v. *Bradley*, 171 Fed. Rep. 951; *National Phonograph Co.* v. *Schlegel*,

128 Fed. Rep. 733; *Edison Phonograph Co.* v. *Pike*, 116 Fed. Rep. 863; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed Rep. 960; *The Fair* v. *Dover Mfg. Co.*, 166 Fed. Rep. 117; *Commercial Acetylene Co.* v. *Autolux Co.*, 181 Fed. Rep. 387; *Æolian Co.* v. *Juelg Co.*, 155 Fed. Rep. 119; *Crown Cork Co.* v. *Brooklyn Bottle Stopper Co.*, 172 Fed. Rep. 225; *Crown Cork Co.* v. *Standard Brewery*, 174 Fed. Rep. 252; *Crown Cork Co.* v. *Standard Stopper Co.*, 136 Fed. Rep. 841; *Cortelyou* v. *Lowe*, 111 Fed. Rep. 1005; *Cortelyou* v. *Carter*, 118 Fed. Rep. 1022; *Cortelyou* v. *Johnson*, 138 Fed. Rep. 110; *S. C.*, 145 Fed. Rep. 933; *Brodrick Copygraph Co.* v. *Roper*, 124 Fed. Rep. 1019; *A. B. Dick Co.* v. *Milwaukee Co.*, 168 Fed. Rep. 930; *Indiana Mfg. Co.* v. *Nichols & Shepard Co.*, 190 Fed. Rep. 579; *Automatic Pencil Sharpener Co.* v. *Goldsmith Bros.*, 190 Fed. Rep. 205; *Thomas A. Edison, Inc.*, v. *Smith*, 188 Fed. Rep. 925; *Waltham Watch Co.* v. *Keene*, 191 Fed. Rep. 855; *Fuller* v. *Berger*, 120 Fed. Rep. 274; *Broderick Copygraph Co.* v. *Mayhew*, 131 Fed. Rep. 92; affd. 137 Fed. Rep. 596.

No attack is or could be made upon the validity of the patents, because the Arrott patent has been upheld by the courts. *Mott Iron Works* v. *Standard Sanitary Mfg. Co.*, 159 Fed. Rep. 135.

The inventions covered by the patents are automatic devices adapted to distribute enameling powder over the surface of the various articles of sanitary enameled iron ware while at a very high temperature.

Under the principle of the *Paper Bag Patent Case*, 105 U. S. 766, the owner of the letters patent here might have permitted the use of his invention for the purpose of manufacturing sanitary enameled iron ware upon condition that it should not be sold at all, and consequently that it might be sold upon prescribed conditions.

The court below erred in not decreeing that the agreements entered into by the defendants, and upon which the petition is based, were not in restraint of interstate

trade and commerce and not in violation of the Sherman Anti-trust Act, and that the use of the patents was not a subterfuge.

The acts alleged in the petition so far as the evidence in the case tends to establish them do not violate the provisions of the Sherman Act. The agreements in the case at bar are not within the Sherman Act. *United States* v. *Winslow*, 195 Fed. Rep. 578, 592. They were open upon the same terms to all who chose to take advantage of them. *United States* v. *Terminal Association*, 224 U. S. 383, 398, 410.

They were, moreover, based upon patents which created a true monopoly, a grant from the sovereign—the Constitution—so that to hold that this monopoly was violative of the Sherman Act would be judicial legislation and an attack upon the whole patent system. *Henry* v. *A. B. Dick Co.*, 224 U. S. 16, 27, 35.

The Sherman Act and the patent laws were passed under separate grants of constitutional power and do not affect each other. *Bement* v. *National Harrow Co.*, 186 U. S. 70, 91; *Rubber Tire Wheel Co.* v. *Milwaukee R. W. Co.*, 154 Fed. Rep. 358, 362.

The true construction of the Anti-trust Act, and one not in conflict with any of the decisions, is that it does not condemn a fair and reasonable attempt to avoid loss by means of trade agreements which are intended to prevent nothing but the cutting of rates below the reasonable expense of production and reasonable profit thereon; nor is the monopolization referred to simply the complete occupation of a certain field if that occupation may be fairly accomplished. *Fonotipia, Ltd.*, v. *Bradley*, 171 Fed. Rep. 951.

The legislative history of the act and its construction as declared in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58, show that it has no application to economic agreements to meet market demands. The agreements in the

case at bar are not within the Sherman Act, because their dominant purpose was to promote the trade of the parties, and there are in the agreements and in the acts under them none of the elements pointed out in the *Standard Oil Case* and the *Tobacco Case* as objectionable, such as enhancement of prices; limitation of output; deterioration of quality; or intimidation, coercion, or fraud.

On the contrary, in these agreements and acts under them, prices were not enhanced, there was no limitation of output, there was a great improvement in quality, and there was no intimidation, coercion or fraud.

For other cases construing the act see *United States* v. *Du Pont De Nemours* Co., 188 Fed. Rep. 127; *United States* v. *John Reardon & Sons*, 191 Fed. Rep. 454; *United States* v. *St. Louis Terminal Assn.*, 224 U. S. 383.

In the case at bar all manufacturers were offered, and any could secure, a similar license agreement, and it was to the pecuniary and selfish interest of the parties interested to grant licenses to as many as possible. See *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. D. 598, A. C. [1892] 25.

For other cases holding trade agreements not to be illegal under the Sherman Act, see *Hopkins* v. *United States*, 171 U. S. 578, 592; *Anderson* v. *United States*, 171 U. S. 604; *Fonotipia, Ltd.*, v. *Bradley*, 171 Fed. Rep. 951, 959; *United States* v. *Knight Co.*, 156 U. S. 1; *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Camors-McConnell Co.* v. *McConnell*, 140 Fed. Rep. 412, and 987; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454; *Prame* v. *Ferrell*, 166 Fed. Rep. 702; *Packet Co.* v. *Bay*, 200 U. S. 179; *Phillips* v. *Cement Works*, 125 Fed. Rep. 593; *S. C.*, certiorari denied, 192 U. S. 606.

In this case, however, the Sherman law has no application. *United States* v. *Winslow, supra; Fire E. C. Co.* v. *Halsted*, 195 Fed. Rep. 295.

For the cases in which it has been held that a violation of the Sherman Act is no defense in infringement suits,

see *Johns-Pratt Co.* v. *Sachs Co.*, 176 Fed. Rep. 738; *Otis Elevator Co.* v. *Geiger*, 107 Fed. Rep. 131; *National Folding Box Co.* v. *Robertson*, 99 Fed. Rep. 985; *Bonsack Machine Co.* v. *Smith*, 70 Fed. Rep. 383; *Strait* v. *National Harrow Co.*, 51 Fed. Rep. 819; *Brown Saddle Co.* v. *Troxel*, 90 Fed. Rep. 620; *Soda Fountain Co.* v. *Green*, 69 Fed. Rep. 333; *Edison El. Light Co.* v. *Sawyer-Man Co.*, 53 Fed. Rep. 592; *Columbia Wire Co.* v. *Freeman Wire Co.*, 71 Fed. Rep. 306.

The claims made by the Government have not been sustained and the authorities relied upon by it can be distinguished. The license agreements are entirely beneficial and have harmed no one.

The court below erred in not granting the motion of the defendants for an enlargement of time to take testimony and that the hearing of the case be postponed until the testimony of the defendants could be completed.

A motion was made at the hearing below for the enlargement of the time of the defendants to complete their testimony on the ground that they had been prevented, by the petitioner's action in instituting criminal proceedings, from properly presenting their defense.

In view of the warnings against the individual defendants testifying as witnesses, and of the necessity of standing trial upon these indictments the individual defendants were unwilling to voluntarily appear and testify, lest by so doing they should furnish the Government with some information which might be used against them upon the said trial.

No matter how innocent a man may believe himself to be, or may be advised as a matter of law that he is, it is perfectly proper for a man to refuse to put himself in a position where what he says may tend to incriminate him if by a reasonable delay, to be granted by a court of equity, he can equally well protect himself and his property at a somewhat later date without any harm to the public.

Mr. Robert B. Honeyman, with whom *Mr. A. Parker Smith* was on the brief, for the Colwell Lead Company, appellant.

Mr. Edwin P. Grosvenor, Special Assistant to the Attorney General, with whom *The Attorney General* was on the brief, for the United States:

This case presents the latest contrivance for evading the rules prescribed by the Sherman Act in the conduct of interstate commerce, and particularly "the rule of free competition among those engaged in such commerce." Mr. Justice Harlan in the *Northern Securities Case*, 193 U. S. 331. Since that act was passed in 1890 this court has had occasion to consider various forms of combinations and monopolization. The earliest form was that of an unincorporated association with a constitution and by-laws accomplishing unlawful restraints condemned in the *Addyston Pipe Case*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *Trans-Missouri Association Case*, 166 U. S. 290, and *Joint Traffic Association Case*, 171 U. S. 505. Destruction of competition between manufacturers through the adoption of a common selling agency given the form of a state corporation was held unlawful in the *Continental Wall Paper Case*, 212 U. S. 227. The holding company as a means of suppressing competition whether between railroads or between industrial companies received the same judgment in the *Northern Securities Case, supra*, and in the *Standard Oil Case*, 221 U. S. 1. In *Miles Medical Co.* v. *Park & Sons*, 220 U. S. 373, this court pronounced unlawful a scheme of so-called agency contracts under which a manufacturer attempted to establish uniform prices on all sales by wholesalers and retailers of proprietary medicines manufactured by him. In the case against the Tobacco Trust, it was held, 221 U. S. 106, that the American Tobacco Company and five other companies organized

under the laws of New Jersey were unlawful combinations, among other reasons because they had acquired monopolistic power with a wrongful purpose and by methods inconsistent with a natural and normal expansion of business. In *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, it was decided that a terminal association of railroads is an illegal restraint so long as it does not act as the impartial agent of every line which, owing to geographic conditions, is under compulsion to use its instrumentalities.

The case at bar is an instance of an attempt to conceal an agreement fixing prices and interfering with competitors under the guise of a legitimate licensing arrangement for the use of patents. The appellants incorporated the unlawful restraints in so-called "license agreements," each corporation defendant entering into one of these "license agreements" with the same contracting party, to whom three patents had been transferred before the signing of the contracts.

In every case we must use the standard of reason for the purpose of determining whether or not an act or alleged restraint of commerce has brought about the harm from which the Sherman Anti-trust Act is intended to guard the people. *Standard Oil Case, supra.*

If the acts complained of have caused the wrongs which the statute forbade, resort to reason is not permissible to allow that to be done which the statute prohibits. It matters not what form the combination may take, or what garb or dress it may put on, for if it directly restrain commerce it falls within the operation of the statute. *Standard Oil Case*, p. 106; *Northern Securities Case*, 193 U. S. 197, 347.

The appellants adopted in this case a form of combination different from any heretofore considered by this court. But it is the form alone that is new. Behind the grinning mask of the "license agreement" is the common,

vulgar type of monopoly which many times has been condemned by this court, dangerous alike to "individual liberty and the public well-being." *American Tobacco Co. Case*, 221 U. S. 183.

Continental Wall Paper Co. v. *Voight*, 212 U. S. 227, and *Miles Medical Co.* v. *Park*, 220 U. S. 373, dispose of this case.

In the first case the element of combination is present which is absent in the second. In each case the contracts were devised with the object of controlling the resale prices of jobbers and of eliminating all competition between jobbers as to prices. The two cases supplement each other, one holding that manufacturers cannot combine through a selling agency and the other that a manufacturer cannot dictate the prices on all sales of his products by all dealers at wholesale and retail.

All combinations obstructing the free flow of interstate commerce or interfering with the citizen's right to engage in commerce or suppressing competition in commerce are unlawful. These propositions are past dispute.

The restraints complained of by the Government substantially and directly operate upon commerce in unpatented enameled ware and only indirectly relate to the use of the patented article or dredger.

It was competition in commerce in unpatented bathtubs which appellants destroyed, and upon persons engaged in commerce in that ware they imposed their unreasonable restraints.

While it is true that the property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way or at a specified place or for a specified purpose, nevertheless restraints so imposed must be legal and reasonable conditions attached to the use of the patented article. They cannot be restrictions inherently violative of some substantive law. *Henry* v. *Dick Co.*, 224 U. S. 1, 24, 26.

In the case at bar the restrictions were not reasonable and legal conditions attached to the use of the patented machine, for they restrained trade and promoted monopolization of commerce in articles not patented. Moreover, the restrictions were not attached to the use of the patented tool, but applied to acts subsequent to the use; that is, to what was done after the use of the tool embodying the invention. The restraints were laid upon the distribution of and commerce in ware in the making of which the tool was used.

In the *Dick Case, supra,* the restriction provided that in the use of the mimeograph the only paper used should be paper which had been supplied by the patentee. Therefore the condition became effective at the time of use of the patented article. There was no attempt to control the output of the mimeograph, or to fix the price at which the users of the mimeograph should sell the mimeographed copies.

Breach of the conditions in the Wayman licenses could occur only after the use of the patented Arrott dredger, for those conditions applied solely to acts performed after the use. Acts in interstate commerce subsequent to the use are not related to the use, and accordingly conditions attached to those subsequent acts do not qualify the use. Therefore it is clear that sales to non-licensed jobbers or sales at prices different from the established prices do not in any sense constitute a use of the invention in a "prohibited way," but are, in fact, violations of those terms of the contracts which apply to the disposition of non-patented articles.

It is immaterial whether or not the patented tool is essential in producing the enamel ware, for in any event no restriction laid upon the distribution of the ware in commerce can relate back so as to qualify even remotely the use of that tool during the manufacture of the ware.

The license agreement sustained by the Dick decision created no monopoly in unpatented things, for it left the whole world free to manufacture and sell paper and ink. It reserved to the patentee the sole right to supply specified unpatented articles to specified persons, but it did not prevent any other persons manufacturing and distributing those unpatented articles generally to all except to those who had bought the patented mimeograph. It gave to no one control either over the source of supply of the unpatented articles or over the demand for those articles, except in respect to the person who bought the patented mimeograph. As to him only was the market curtailed and the demand controlled.

On the other hand, in the case at bar the direct object of the appellants was to monopolize commerce in articles unpatented and of universal use. The combination directly affected and absolutely controlled every phase of that commerce. It not only dictated the prices on sales from the manufacturers to the jobbers and every term and condition applicable to those sales, but also regulated in the same detail the sales of the jobbers to the plumbers. Moreover, every restriction contained in the agreements has been cruelly and oppressively enforced and maintained.

The patentee who grants a license to make and use the patented machine has no control by virtue of his patent over the article made with the help of the patented machine. *Keplinger* v. *DeYoung*, 10 Wheat. 358; *Merrill* v. *Yeomans*, 94 U. S. 568.

No word or phrase in the Sherman Act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combinations. *United Shoe Machinery Company* v. *La Chappelle*, 99 N. E. Rep. 289.

The patent laws and the Sherman Law are not conflicting, but in their respective domains are mutually exclusive of each other.

The right conferred by the patent laws is not the right to make, use and vend the thing patented, for this right exists by virtue of the common law and independently of the patent statutes; this right to make, use and sell the patented devise is a natural right. The only right which the letters patent grant is the right to exclude all other persons from making, using or vending the thing patented without the permission of the patentee. *Bloomer* v. *McQuewan*, 14 How. 539, 548; *Patterson* v. *Kentucky*, 97 U. S. 501, 506.

The right to sell a patented article is subject to the police regulation of the State. *Patterson* v. *Kentucky*, 97 U. S. 501, 505; *Webber* v. *Virginia*, 103 U. S. 344, 347; *In re Brosnahan*, 18 Fed. Rep. 62, 165.

In the cases last cited the exercise of the police power of a State in prohibiting the sale of patented articles was held not to be in conflict with the patent laws of Congress. If the State may prohibit altogether the sale of patented articles because of injury resulting from such sale to its citizens, it follows that the State may prohibit the sale of patented articles pursuant to combinations in restraint of intrastate trade and commerce, for such combinations are equally harmful to the public. In the one case the State is prohibiting any sale, in the other case it is merely regulating the sale of the patented article in so far as it declares that no such sale shall be made under any unlawful combination monopolizing or restraining intrastate commerce. In either case the State is exercising its police power to protect its citizens; neither exercise of power conflicts with the patent laws. The reason is clear. The regulation of the State is being applied to natural rights and not to patent rights. The right to sell, a common-law right, is denied by the State in the one case and regulated in the other, the State acting in each case for the good of the public.

In passing the so-called anti-trust statutes Congress and a state legislative body act under different sources

of power, but in each case the exercise of the power arrives at the same result, namely, prohibition of restraints of trade and of monopolies. The effect of the state act and of the Sherman Act is the same; that is, the two acts relate to and operate upon the same subject-matter, although one is enacted under the police power of the State and the other under the authority of Congress to regulate interstate commerce. If the exercise of the police power of the State does not encroach upon the domain of the patent laws, it cannot in reason be argued that to include within the operation of the Sherman Act combinations restraining trade is to subtract from the monopoly of the patentee.

Whether appellants were entitled to further time for the taking of testimony was a matter resting in the discretion of the lower court. The Sherman Act provides four remedies: a criminal proceeding, a suit in equity, forfeiture of property and an action in treble damages.

The wisdom of the law and the effect of rigid enforcement are not matters for consideration by the court, but by other departments of the Government. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit by the Government against appellants for a violation by them of the act of July 2, 1890, 26 Stat. 209, c. 647, commonly known as the Sherman Anti-trust Act.

A decree was entered in favor of the Government, from which appellants (designated herein as defendants) have prosecuted this appeal. 191 Fed. Rep. 172.

There are sixteen corporate and thirty-four individual defendants, the latter, with the exception of Edwin L. Wayman, being the officers, presidents or secretaries, of the companies.

The corporate defendants were alleged to be the manufacturers of enameled iron ware in various places in the United States, manufacturing 85% of such ware and engaged in interstate commerce in such ware throughout the United States and with foreign countries in competition with one another and with certain other manufacturers of such ware, and that in 1909, or early in 1910, they entered into and engaged in a combination and conspiracy to restrain such trade and commerce.

The defendants denied the charges against them, Wayman doing so in a separate answer. The Colwell Lead Company denied that it was engaged in interstate commerce.

A great deal of testimony was taken and the case quite elaborately argued, but in the view we take of it it is in comparatively narrow compass, depending upon the application of well-settled principles.

The corporate defendants are manufacturers of sanitary enameled iron ware, such as bath tubs, wash bowls, drinking fountains, sinks, closets, etc. The enameling consists in applying opaque white glass to iron utensils, first in the condition of a liquid and, second, in the form of a powder. The process consists in heating the utensil to a red heat and then sifting upon it the enameling powder. The powder is fused by the high temperature and forms on the utensil a hard, impenetrable, insoluble, smooth and glossy surface.

Prior to the invention of James W. Arrott, Jr., covered by letters-patent issued September 26, 1899, the enameling powder was applied by a sieve attached to a long handle which was held by the workman with one hand and the sieve made to vibrate by the workman striking the handle with his other hand, thereby sifting the powder over the surface of the iron ware. The implement was an imperfect one, not easily handled, and by its use the workmen were subjected to intense heat and physical strain. The

flow of the powder beside was not continuous; it was cast upon the metal in intermittent puffs, causing in many instances an unequal distribution of the powder and producing defective articles which either had to be thrown away or sold as "seconds." With Arrott's invention these evil results are lessened or disappear. The sieve is mechanically vibrated very rapidly, causing, instead of an intermittent flow of the powder as in the hand process, a practically continuous flow. Both hands of the workman may be used to guide and direct the sieve. The advantages of the instrument over the hand process are decided. It is more efficient and more economical. It makes a better article and in less time. There is no waste in defects or "seconds." The workman is relieved to some extent from "fierce heat conditions," to quote from the answers.

At the time of the contracts which are attacked by the Government the Standard Sanitary Manufacturing Company was the owner of the patent and manufacturer of 50% of the ware, and used in its production the patented device. Some of the other manufacturers were infringing and controversies existed. Some yielded to its validity, others contested it. It was sustained by the courts in several cases.

We have gone through this detail to exhibit the conditions, as asserted by defendants, which confronted them and induced their contracts. In further display of it we quote Wayman's answer as follows:

"For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott invention, and moreover, produced a

disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of Sanitary Enameled Iron-Ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective."

On the situation thus asserted to exist the defendants build their defense, contending that Wayman saw its evils and conceived the way to correct them; and insist that the following facts are established by the evidence: Wayman was familiar, through his connection with another enameling company called the Seamless Steel Bath Tub Company, with the enamel ware trade and had become convinced of the advantages, indeed, necessity, of the use of the Arrott invention. He tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies, and pending the negotiations the Seamless Company failed and Wayman turned to other plans, one of which resulted in the contracts under review.

As early as 1908, impressed with the importance of the Arrott patent, he endeavored to have the Standard Company grant licenses to other companies in order to improve trade conditions, and to this end he tried to interest other gentlemen in the project. The Standard Company was unwilling to grant, and other manufacturers were equally disinclined to accept them. He then conceived the idea of a holding company, but this failed also, the Standard still being unyielding, stating by one of its officers that "his company was unwilling either to sell the Arrott patent or to enter into any arrangement which would lessen the advantage which it had by reason of the ownership of the Arrott patent." The plan was, therefore, abandoned.

In August, 1909 (we are still following the version of the testimony given by counsel for defendants), it was suggested to Wayman by a person connected with one

of the manufacturing companies that he (Wayman) apply for the position of secretary of the Association of Sanitary Enameled Ware Manufacturers which was about to be reorganized. The position, it was said, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent and establish such relation with the manufacturers of enameled ware as would enable him to present in the most favorable manner his ideas in regard to the advantages of patent licenses under the Arrott patent. This association was a pure trade organization and not formed to control or regulate prices. Wayman applied for and obtained the position and commenced again negotiations for the Arrott patent and persisted, against the apparent reluctance of the Standard Company to give up the advantages of the patent. Finally he impressed the manager of the Standard factories with the greater advantages which would come to his company by the elimination of "seconds" and removing them as competitors of the better articles of the Standard, confining the competition to such articles of which the Standard produced 50%. The manager of the Standard and that company yielded to the representation of these advantages.

These advantages are dwelt on and made much of by counsel and they quote testimony to display their extent. "Seconds," as we have said, were articles of inferior or defective manufacture, and as their inferiority was not apparent they could be represented and sold as of standard quality. Such deception, it is asserted, was frequently practiced, and the articles turning out defective discredited enamel ware, gave it a bad reputation, and there was a growing difficulty to maintain or extend its sale. With "seconds" out of the way, it may be conceded, as it is contended, that only honest articles were available to plumbers, jobbers and builders.

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. He, in the

following December, secured also an option from the J. L. Mott Iron Works upon a patent called the Dithridge, and from the L. Wolff Manufacturing Company an option upon the Lindsay patent. These patents were infringements of the Arrott device. Thus equipped, Wayman proceeded to engage the manufacturers in his proposition.

This summary of the situation counsel have supplemented by a declaration of motives. Counsel say that Wayman and the manufacturers were advised by able and competent lawyers of the legality of their plan. "Wayman's motive," it is asserted, "was to make money for himself, not as a manufacturer but as the owner of a patent, receiving royalties from those whom he licensed to use his patented invention." The form of his license, it is further asserted, followed the precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or to grant it upon such terms as he may choose to impose. Such being his motive and such being his right, he, it is contended, negotiated with and contracted with the manufacturers of enameled ware. And their motives also are attempted to be justified, though the necessity for doing so is disclaimed.

Wayman's right, it seems to be contended, is all sufficient, and that the manufacturers only paid the price that he could legally demand. As the demand was legal, it is argued, the payment of the price could not be illegal. But the Government asserts subterfuge, illegal purpose liveried in legal forms to give color of right to illegal practices.

The charge challenges consideration of the relation between that which the manufacturers engaged to do and the protection of the exclusive right attached to the invention. Upon such consideration how far the licenses transcend such right and violate the Sherman Law we can then determine. And we shall keep in mind and apply

the principle expressed in *Bement* v. *National Harrow Company*, 186 U. S. 70, 92, that the Sherman Law "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

In our inquiry we shall accept *arguendo* the statement of defendants of their inducement and purpose. We say "*arguendo*" because the asserted inducement and purpose are denied by the Government, it contending, as we have seen, that the Arrott patent was but a pretense and that the agreements were put in the form of licenses of it to at once accomplish and palliate evasions of the law. The fact being in controversy, we place our consideration and decision on other elements. In other words, we will consider the case from the standpoint of defendants' view of the situation, with comments as we proceed as to what they did to meet it and how far what they did accorded with or transgressed the law.

The contention of the defendants then is that the Standard Company's position and power as owner of the patent, and Wayman's were identical. What it could have done, it is contended, he could do, and its relation to the trade and the relation of other manufacturers to the trade clearly demonstrate, it is further contended, that as that company could have made the contracts, Wayman could do so.

To support the contention defendants represent the Standard as the dominant (it produced 50% of the articles) and the only honest manufacturer pointing out to other manufacturers the worthlessness of their output, they not having the Arrott patent; also the dishonesty of their output, they putting out "seconds," the inferiority

of which was "discernable only by experts"—thereby defrauding the public, "discrediting the ware and demoralizing the market and business." To avert these evil results, it is represented that the Standard was willing to forego the advantages which its ownership of the Arrott patent gave it and confer them upon the other manufacturers. But upon terms. "First and foremost" it was to be agreed that no "seconds" should be marketed. In the second place, a standard price must be agreed to so that henceforth rivalry should be "in the quality of the ware turned out at a uniform price or in any other collateral inducement to the purchaser" that would not "affect the quality of the ware." Wayman's agency and office, it is represented, was that of "watching all parties and insuring their fidelity to the agreement by the payment of a royalty for the use of the invention." And this, it is said, is "all there is in substance or principle to the case at bar, except that Mr. Wayman, instead of the Standard Company, was the originator of the scheme and that he persuaded his co-defendants to enter into it."

But the scheme has other features and effects which counsel overlook or ignore. It is immediately open to the criticism that its parts have no natural or necessary relation. What relation has the fixing of a price of the ware to the production of "seconds"? If the articles were made perfect their price in compensation of them and by unfettered competition would adjust itself. To say otherwise would be in defiance of the examples of the trading and industrial world. Nor was a combination of manufacturers necessary to the perfection of manufacture and to rivalry in its quality. And it may be asked if such perfection and its protecting influence against deception and the ruinous depression of prices were so desirable and potent as it is contended that they were, why were they not extended to "baths," the most important of the articles in the trade? It is not an adequate answer to say that

there was a time guarantee of them even though it was given to all of them, as it was not. The justification of defendants is based not on the responsibility of manufacturers but on the integrity of the articles assured by the use of the Arrott device.

It is the foundation of defendants' argument that to make the use of that device universal was the prompting of Wayman's energies to unite the manufacturers and to remove the evils which beset the trade and which were "discrediting the ware and demoralizing the market and business." It was the representation of the advantage, we are told, of such results that broke down the resolution of the Standard Company not to share the use of the device with other manufacturers. But granting that there was provision or security against the production of "seconds" in all of the articles, it seems from what we have said above that all of the substantial good which is asserted to have been the object of the agreements could have been attained by a simple sale of the right to use the Arrott patent, conceding to it the dominant effect which is attributed to it. Nor is the justification of defendants made more adequate by the representation that "Wayman's motive was to make money for himself, not as a manufacturer but as the owner of the patent, receiving royalties from those whom he licensed to use his patented invention." Wayman testified to another motive. By fixing prices "he hoped," he said, "as one of the features of the license agreements, to enable the companies to abolish ruinous competition" and to get a "revenue for each of the companies to enable them to make a reasonable profit."

But motives and inducements may not be easily estimated, and we will pass to a consideration of the agreements. On March 30, 1910, the Manufacturers' Association passed a resolution and a committee of five was constituted, to be known as the price and schedule com-

mittee, to which the license agreements and resale agreements should be referred. This committee was to interview the various manufacturers and obtain their consent to the agreements which were to become effective "when the consent of 83% of the production" was had. The signatory manufacturers agreed to "give their prompt coöperation to the matter in question."

At the same time the following resolution was passed:

"Whereas, a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and

"Whereas, long-term contracts are a menace to said proposition,

"We, the undersigned, manufacturers of enameled ware, hereby agree to take no orders for delivery beyond May 31, 1910.

"This agreement is not binding upon the signers unless all members of the Enameled Ware Manufacturers' Association are parties thereto and append their signatures.

"The within is agreed to."

At the same meeting a memorandum of agreement was proposed which was to be executed with Wayman as licensor of various patents covering pneumatic dredgers. The agreement covered selling schedules of the ware and provided for the royalties to be paid; the selling price to the jobbers to be established by the licensor through a committee appointed by the various manufacturers. It provided penalties for the violation of the price regulations, and preferential discounts (discounts allowed to certain manufacturers) from the selling prices. Such discounts were to be allowed on sales to jobbers only.

Such details as might "be necessary for the perfection of the arrangement" were reserved for the next meeting of manufacturers. After this meeting a circular letter was sent by Wayman to all manufacturers apprising them of what had transpired, the attention that had been

given the subject and informing them that "the final license agreement papers" would be executed at the next meeting, to be held in May.

The license agreement was subsequently executed. It granted to the licensee the right to use in the manufacture of enameled ware the Arrott patent, also a patent to E. Dithridge for a pneumatic sieve and a patent to William Lindsay for an "Enameling powder distributor." It released the claims for past infringement so long as the licensees operated under the license. It fixed royalties of $5.00 per day for each furnace, subject to a diminution of like amount for furnaces shut down for more than six consecutive working days. It fixed preferential discounts from the regular selling prices, confining them only to sales by the manufacturers to jobbers. And it was provided that no goods manufactured under the license should be sold unless they bore a registered label (except where otherwise specified) owned by the licensee and in addition thereto a license tag or label approved by the licensor placed in a visible position thereon.

The provision for prices was as follows:

"The Licensor agrees that he will employ a commission of six (6) persons, of which he is to be one and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commissions shall have supervision of all the relations and transactions between the parties hereto under this agreement, but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

"All terms and conditions relative to prices and discounts now established by the Licensor and set forth in

the annexed schedules and made a part hereof, shall remain in force and effect until other terms, conditions and preferential discounts are substituted therefor by the Licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the Licensor to the Licensees. The Licensee covenants to adhere to and maintain such terms, conditions, regulations, prices and preferential discounts as may be established by the Licensor, from time to time, *and the Licensee further agrees to sell no 'seconds' or 'Bs' covered by Schedules* 4, 4½, 5 *and* 6." (Italics ours.)

The restrictions as to prices at which the goods were to be sold did not apply to those sold and exported to foreign countries. Such sales were required, however, to be proved to the licensor.

There was a provision for the return of 80% of the royalties paid if the agreement should be complied with. These royalties, called in the agreement "Royalty Rebates," were forfeited if the provisions of the agreement should be violated in any particular.

The foregoing constitute the essential provisions of the manufacturers' agreements and it will be observed what little space is given to "seconds," though it is asserted in the argument, as we have seen, that to get rid of the evils of their production and sale was the chief impulse to the agreements. The covenant as to "seconds" was expressed by the words which we have italicized in the provision relating to prices and discounts quoted above. The schedules referred to are found in the paragraph providing for preferential discounts and cover all articles but baths, these being described in schedules 1, 2 and 3.

There was also a jobber's license agreement that bore at the top the note that it "must be executed by the purchaser in order to purchase licensed sanitary enameled

ware." It conveyed to the jobber the right to buy and sell such ware, provided for certain discounts and details as to shipments and deliveries, and that the sales were to be made "by the purchasers at prices to be established and prevailing in the various zones into which the goods were shipped, regardless of the point of purchase." There was a provision for the payment of the purchase price at certain rebate periods if the agreement should be complied with. The resale prices as established from time to time were required to be maintained by all jobbers and dealers, and sales could not be made from one jobber to another for any better prices than "established by the sheets," and the purchaser agreed to "observe and strictly maintain . . . the selling prices as they are set forth in the schedules and observe and adhere to the rules and regulations as embodied in the price sheets" or embodied in price sheets which might be issued by or under the authority of the licensor. Articles might be added to or removed from the schedules at any time. The purchaser also agreed during the life of the contract not to purchase, sell, advertise or solicit orders for, or in any way handle or deal in, sanitary enameled iron ware of any manufacturer not licensed under the letters-patent enumerated in the agreement, except with the express written permission of the licensor. A breach of any of the conditions subjected the contract and all unfilled orders to cancellation, the forfeiture of rebates and the power to obtain the ware manufactured under the letters-patent from any of the licensed manufacturers. The purchaser further agreed not to sell any goods on hand manufactured in accordance with the patents, irrespective of by whom manufactured, except in accordance with the prices, conditions and regulations of sale established by the licensor.

The price list contained a notice to the jobbers' salesmen that the agreements executed by their companies

required them to resell the various licensed products at no better prices, terms, or other regulations than therein established. And further, as changes, additions and eliminations occurred, new sheets would be issued promptly.

These are the main outlines of the agreements, and, as emphasizing them, Wayman directed the manufacturers at the time they sent out the jobbers' agreements to also send with them a letter containing the following: "It is necessary for you [the jobbers] to execute these contracts before we [the manufacturers] can sell you licensed sanitary enameled ware." This provision was enforced, as indicated by letters in the record. It was also the condition expressed by Wayman in his correspondence with other manufacturers whom he tried to induce to accept licenses and become parties to the agreements. In a letter to a jobber Wayman expressed the hope that the jobber could see his way clear to execute the agreement, as it covered "a matter entirely for the jobbers' benefit." He further stated, "The Cedar Rapids Pump Company of your city have executed the agreement and I hope you will coöperate immediately with your local competitors, which will be much more advantageous than a continuous cut market."

In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry

was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer and the potency of the scheme was established by the coöperation of 85% of the manufacturers and their fidelity to it was secured not only by trade advantages but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail." The royalty for each furnace was $5.00, 80% of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90% of the jobbers in number and more than 90% in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the *Bement Case*. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manu-

facturers and dealers in tiles combined them in *Montague & Co.* v. *Lowry*, 193 U. S. 38, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62.

The Colwell Lead Company asserts the legality of the license agreements as the other defendants do, and, besides, urges that it was not engaged in interstate commerce but that it only sold to plumbers and that none of the price restrictions was applicable to it, nor was it

at any time in any relations whatsoever with the other defendants. It asserts that it was itself a jobber and therefore had no occasion to deal with jobbers and that it was not present nor represented at any of the meetings preceding the license agreements.

It does appear, however, that the company was a member of the association of manufacturers, an association which, we have seen, passed the first resolution in regard to the license agreement, and the president of the company when addressed on the subject of the agreement expressed an appreciation of it provided all manufacturers should "sign up." He, however, reserved final judgment until he could go over the matter in detail with Wayman, who had addressed him, and declared that he would "be greatly influenced by what other manufacturers do."

There is a letter in the record, about which, however, there is some dispute, purporting to have been written by the president of the company to Wayman, in which the latter's interpretation of a previous letter was said to be "entirely correct," and which contained the following: "We will not require any preferentials below the lowest price made by the Standard Sanitary Manufacturing Co." There can be little doubt of the genuineness of the letter, and it is certain that the company assented on the twenty-fifth of May, 1910. Its license, however, was modified in order that it might meet local competition in New York, its business being, it is contended, mostly local.

It appears from the testimony that the company was a manufacturer and a jobber, manufacturing about one-half of what it sold. As a jobber it bought goods from other manufacturers but it denies there was an agreement as to prices with such manufacturers.

The testimony as to the state or interstate character of its business is that it manufactures at Elizabeth, N. J.,

and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Mass., and Brooklyn. The trade of its Worcester branch covers about two hundred miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the ware-rooms.

It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader. The fact that it was restricted in less degree than the other jobbers, given a certain freedom of competition to meet local conditions in New York, diminishes only the degree of culpability but does not entirely remove it. Indeed it may be said that such freedom does not even diminish culpability. It is a concession, which may be made a means of crushing competition where it is most formidable.

Error is assigned on the action of the Circuit Court in not granting a motion made by defendants for an enlargement of time to take testimony on the ground that they had been prevented, by the action of the Government in instituting criminal proceedings, from properly presenting their defense.

The question arose upon the action of witnesses who were subpœnaed and called by the Colwell Lead Company, they being officers of some of the other manufacturers. The Government apprehending and as it now contends, that the witnesses were called to give them immunity from a criminal prosecution which was then pending in Michigan, notified them that if they testified they would do so at their peril, as immunity could only be claimed by

witnesses for the Government. The witnesses thereupon, upon the advice of counsel, refused to testify, leaving, as it is contended, the Colwell Company particularly, and the other defendants as well, without the evidence such witnesses could have given and which, it is said, they did give subsequently in the criminal trial.

Whether the testimony, if given, would have conferred immunity we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the Government there may be an action for damages by a "person injured by reason of anything forbidden by the Act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

Decree affirmed

SMITH AND OTHERS, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLANTS, *v.* HITCHCOCK, POSTMASTER-GENERAL.

FRANK TOUSEY, PUBLISHER, A CORPORATION, *v.* SAME.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 31, 32. Argued November 5, 6, 1912.—Decided November 18, 1912.

Even though a question of law be raised by an order of the Postmaster-General excluding matter from the mails, the court will not interfere unless clearly of the opinion that the order is wrong. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

Every series of printed papers published at definite intervals is not necessarily a periodical within the meaning of the provisions of the act of March 3, 1879, c. 180, 20 Stat. 355, defining second-class mail matter.

Books that are expressly embraced by § 17 of the act of March 3, 1879, as third-class matter and subject to the higher rate of postage cannot be made second-class matter by simply publishing them at regular intervals even though, as in this case, purporting to be a series of adventures of the same person. *Houghton* v. *Payne*, 194 U. S. 88.

"Periodical" as used in the act of March 3, 1879, implies that no single number of a series is a complete book in itself.

As a general rule, with few exceptions, a printed publication is a book within the meaning of § 17 of the act of March 3, 1879, when its contents are complete in themselves, deal with a single subject, need no continuation and have appreciable size; and so *held* that the publications involved in this case are books and not periodicals.

Where the point to be decided is a pure question of law which can be reviewed by the courts, the Postmaster-General satisfies the requirements of the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, by simply hearing the party claiming to be aggrieved by an order excluding matter from the mail; and one so heard and who is not prevented from offering material evidence cannot complain in the court reviewing the order that he was denied a hearing under the act.

34 App. D. C. 521 and 535, affirmed.

THE facts, which involve the validity of orders of the Postmaster-General excluding appellants' publications from second-class mail privileges, are stated in the opinion.

Mr. J. J. Darlington and *Mr. H. H. Glassie* for appellants:

The order excluding appellants' publication from the second class was not grounded on any provision of the statute, but upon superadded limitations not found therein. It is therefore void.

The exclusion of appellants' publications, whereby they are indirectly destroyed, cannot be justified upon the pretext of a personal literary and moral censorship unknown to the law. *Lewis Pub. Co.* v. *Wyman*, 152 Fed. Rep. 787, 792; *Weybridge* v. *Addison*, 67 Vermont, 569, 575; *Nat. Ry. Pub. Co.* v. *Payne*, 30 Wash. Law Rep. 341; *Wedderburn* v. *Bliss*, 12 App. D. C. 485, 493; *Garfield* v. *Spalding*, 32 App. D. C. 154, 158; *Myer* v. *Peabody*, 212 U. S. 78, 84; *Londoner* v. *Denver*, 210 U. S. 373, 385; 15 Op. Atty.-Gen. 346.

The exclusion was really grounded not on the act of March 3, 1879, but upon the amended regulation of July 17, 1901, already adjudged void. It is conceded that appellant's publication complies with every specified condition prescribed by this statute as a test for admission. There has been a long-continued and general acceptance of this publication as a periodical. The construction of the term "periodical" as accepted and acted on by the Post Office Department when appellant's publication was admitted is a construction contemporaneous with the act of March 3, 1879, itself, and thereafter followed for twenty years. That construction was, moreover, the established construction of the same term in prior postal statutes and, as such, was deliberately and studiously adopted by Congress in the framing of this act. *Mason* v. *Fearson*, 9 How. 248, 258; *Reiche* v. *Smythe*, 13 Wall. 162, 164; *The Abbottsford*, 98 U. S. 440, 444; *Claflin* v. *Commw. Ins. Co.*, 110

U. S. 90, 93; *New Haven R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361, 401; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Hermanos*, 209 U. S. 337, 339; *White-Smith Co.* v. *Apollo Co.*, 209 U. S. 1, 14; *B. & O. Southwestern R. R.* v. *United States*, 220 U. S. 94, 103; *United States* v. *Press Publ. Co.*, 219 U. S. 1, 11; *Chesapeake & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238, 243; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 559; *Platt* v. *Union Pac. R. Co.*, 99 U. S. 48, 64; *Blake* v. *Nat. Banks*, 23 Wall. 307, 319; *Schell's Ex.* v. *Fauche*, 138 U. S. 562, 572; *United States* v. *Hill*, 120 U. S. 169, 180; *Hahn* v. *United States*, 107 U. S. 402, 406; *Butterworth* v. *United States*, 112 U. S. 50, 67; *Philbrick* v. *United States*, 120 U. S. 52, 59; *Bate Refg. Co.* v. *Sulzberger*, 157 U. S. 1, 44; *United States* v. *Haley*, 160 U. S. 136, 141, 145; *Hewitt* v. *Schultz*, 180 U. S. 139, 157; *Midway Co.* v. *Eaton*, 183 U. S. 602, 609; *United States* v. *Finnell*, 185 U. S. 236, 244; *United States* v. *Union P. R. Co.*, 91 U. S. 72, 79; *United States* v. *Freight Ass'n*, 166 U. S. 293, 318; *Chiles* v. *Ches. & O. Ry.*, 218 U. S. 71, 76; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Railway Pub. Co.* v. *Payne*, 30 Wash. Law Rep. 338; *Payne* v. *Railway Pub. Co.*, 20 App. D. C. 581; *Barden* v. *North. Pac. R. R.*, 154 U. S. 288, 322; *Kilbourn* v. *Thompson*, 103 U. S. 176, 196, 199; *Legal Tender Cases*, 12 Wall. 457, 554.

Irrespective of evidence as to intent of Congress, appellants' publication is a periodical in the ordinary meaning of the term.

The tests now set up by the Department are not within the *ratio decidendi* of *Houghton* v. *Payne*, but additions to the requirements of the statute.

The exclusion is not based upon any settled, definite or uniform construction of the statute; but arbitrarily discriminates between publications essentially similar. *Payne* v. *Houghton*, 22 App. D. C. 234, 239; *Houghton*

v. *Payne*, 194 U. S. 88, 98; *Ogden* v. *Saunders*, 12 Wheat. 213, 233; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 574; *Brooks* v. *Marbury*, 11 Wheat. 28, 91; *Carroll* v. *Carroll*, 16 How. 275, 287; *Wis. &c. R. R.* v. *Price Co.*, 133 U. S. 496, 509; *Hans* v. *Louisiana*, 143 U. S. 1, 20; *Cross* v. *Burke*, 146 U. S. 82, 87; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 679; *Downes* v. *Bidwell*, 182 U. S. 244, 259; *Harriman* v. *Nor. Securities Co.*, 197 U. S. 244, 291; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507; 27 Op. Atty.-Gen., p. 53.

The Postmaster-General has no power, by misconstruction of law, to take away from the citizen his positive legal right to have mail matter transported at the rate fixed by statute. Such mistake of law does not bind the courts or preclude their granting relief.

The right to post mail matter at the rates established by Congress is a fixed legal right which cannot be impaired by the act of an administrative officer. The definition of a word of common speech used as a statutory term is a pure question of law. *Smith* v. *Powditch*, 1 Cowper, 182; *Stock* v. *Harris*, 5 Burrows, 2711; *Rowning* v. *Goodchild*, 2 Wm. Black. 907, 910; *Barnes* v. *Foley* [1768], 4 Burrows, 2149; *Jones* v. *Walker* [1777], 2 Cowper, 624, 626; *Payne* v. *Ry. Pub. Co.*, 20 App. D. C. 581, 597, 599; *Morrill* v. *Jones*, 106 U. S. 466; *Teal* v. *Felton*, 12 How. 284, 291; *Am. School &c.* v. *McAnnulty*, 187 U. S. 109; *Sandford* v. *Sandford*, 139 U. S. 642, 647; *Quimby* v. *Conlan*, 104 U. S. 420, 426; *Moore* v. *Robbins*, 96 U. S. 530, 535; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Johnson* v. *Towsley*, 13 Wall. 72; *Silver* v. *Ladd*, 7 Wall. 217; *Roberts* v. *United States*, 176 U. S. 221, 231; *United States ex rel.* v. *West*, 19 App. D. C. 333; *Garfield* v. *Goldsby*, 211 U. S. 249, 261; *McCulloch* v. *Maryland*, 4 Wheat. 316, 413; *State* v. *Stevens*, 69 Vermont, 411; *Taylor* v. *Horst*, 52 Minnesota, 300; *Commonwealth* v. *Sullivan*, 146 Massachusetts, 142; *Marvel* v. *Merritt*, 116 U. S. 11.

The Solicitor General for the appellee.

The former Solicitor General, Mr. Frederick W. Lehmann, also filed a brief for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills to restrain the Postmaster-General from revoking orders according second-class mail privileges to the several plaintiffs—in the first named case in respect of a series of publications issued under the name of the Tip Top Weekly, in the second in respect of a similar one entitled Work and Win. The ground of the bills is that the privileges were annulled without granting the hearing required by the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, and that the publications are periodical publications within the meaning of the act of March 3, 1879, c. 180, §§ 7, 10, 14; 20 Stat. 355, 358, 359, and therefore must be carried as second-class matter, by the very terms of the law.

We will take up the second question first. The facts are not in dispute and are alike in the two cases. The publications are weekly, each containing a single story complete in itself, but the same character is carried through the series and the reader is led by announcements to expect further tales after the one before him. Most of the stories are by the same author. The element of sequence may be indicated by a few of the titles in the Tip Top Weekly: Frank Merriwell in Arizona; or, the Mysteries of the Mine. Frank Merriwell's Friend; or, Muriel the Moonshiner. Frank Merriwell's Double; or, Fighting for Life. Frank Merriwell Meshed; or, the Last of the Danites. Frank Merriwell's Magic; or, the Pearl of Tangier. Frank Merriwell in London; or, The Grip of Doom, etc., etc. There is nothing else in a number except a roll of honor or list of some of those who have

endeavored to increase the circulation of the series, laudatory letters with insignificant comments, and a page or two of inquiries as to physical culture purporting to come from readers, with short replies, all more or less incident to the muscular tenor of the tales. The publications measure about eleven by eight inches on the outside, are said to contain about thirty thousand words, have thirty-two pages, including a page of advertisement and exclusive of the cover, of which twenty-six are filled by the story. The front cover bears a colored illustration of some incident narrated within.

Thus a question of law is raised, although as suggested in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108, we should not interfere with the decision of the Postmaster-General unless clearly of opinion that it was wrong. *Ibid.* 110. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 509. We have no such clear opinion, as the decision is pretty nearly if not wholly sustained by *Houghton* v. *Payne*, 194 U. S. 88, and *Smith* v. *Payne*, 194 U. S. 104. Indeed the latter case dealt with The Medal Library, which was a periodical publication of several issues of the Tip Top Weekly bound together; as the principal plaintiff now puts it, in book form, and it is true, reprinted in a different size and shape. Some attempt was made to reargue the law of the decisions just cited, but we do not feel called upon to reopen the discussion in that part of the appellants' brief.

It must be taken as established that not every series of printed papers published at definite intervals is a periodical publication within the meaning of the law, even if it satisfies the conditions for admission to the second class set forth in § 14. *Houghton* v. *Payne*, 194 U. S. 88, 96. It is established by the same authorities, that books, that are expressly embraced in mail matter of the third class by § 17 and so made liable to a higher rate of postage,

cannot be removed from that class and brought into the second by the simple device of publishing them in a series at regular intervals of time. It was suggested to be sure that the distinction was between reprints of well-known works and new matter, but we can see nothing in that; neither do we find much weight in the identity of authorship, the retention of the name of the hero through successive tales, or the ever renewed promise of further wonders in the next. All these might co-exist and yet each number might be a book, and if so it goes into the third class. "Mail matter of the third class shall embrace books." § 17.

The noun periodical, according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion if not a promise of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself. But we can approach the question more profitably from the other end, and shall have gone as far as we need when we decide whether the numbers exhibited constitute so many books. The word book also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present § 17. As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together. Without attempting a definition we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. There may be exceptions, as there are other instances of books. It hardly would be an exception if, where the object is information and the subject-matter is a changing one, a publication periodically issued giving information for

the time should be held to fall into the second class. From this point of view the Tip Top Weekly and Work and Win are books. They are large enough to raise no doubt on that score; each volume is complete in itself and betrays no inward need of more, notwithstanding that, as in the highwayman stories of an earlier generation, further adventures to follow are promised at the end.

The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing. The parties were notified that they would be granted a hearing at the office of the Third Assistant Postmaster-General, Washington, D. C., at a fixed day and hour, to show cause why the admission to the second class should not be revoked and the third class rate of postage charged, on the ground that the issues were not periodical publications but were books. They sent a representative to Washington who left a printed response in advance, asking for further opportunity for argument if the authorities were not satisfied, and who called at the appointed time. He was referred to the Chief of the Classification Division, the proper person. Rev. Stat., § 161. Postal Laws and Regulations, Ed. 1902, §§ 6, 19, subsect. 1, 8. He saw him and asked if the brief had been received, was answered yes and then asked if the other had any questions to ask and was answered no. He presented a pamphlet, 'The Influence of the Dime Novel' and departed, offering no further argument, seemingly somewhat aggrieved at not having seen the Third Assistant Postmaster-General in person. Subsequently, the Assistant Attorney-General for the Post Office Department was consulted by the officials and in accordance with his opinion the order was issued which the plaintiffs seek to restrain.

The matter was argued to us with some feeling, and it is not impossible that the interview gave an impression of official indifference. But the plaintiffs allege in their bills that the question was a pure question of law; it was a ques-

tion that they had a right to have reviewed and have had reviewed in this court; it was clearly defined; the official was not called on to state reasons or to discuss—his only duty was to hear, and beyond offering the printed brief the plaintiff's representatives showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. The facts and the question were as plain then as now. The conclusion reached was right, and in the circumstances disclosed we are of opinion that the plaintiffs had no cause to complain.

Decrees affirmed.

UNITED STATES *v.* UNION PACIFIC RAILROAD COMPANY.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

No. 446. Argued April 19, 22, 23, 1912.—Decided December 2, 1912.

The purchase by the Union Pacific Railroad Company of forty-six per cent of the stock of the Southern Pacific Company, with the resulting control of the latter's railway system by the former, is an illegal combination in restraint of interstate trade within the purview of the Sherman Anti-trust Act of 1890 and must be dissolved.

The Sherman Anti-trust Act of July 2, 1890, 26 Stat. 209, c. 647, applies to interstate railroads which are among the principal instrumentalies of interstate commerce.

The Sherman Act is intended to reach and prevent all combinations which restrain freedom of interstate trade, and should be given a reasonable construction to this end.

The opinions in *Standard Oil Co.* v. *United States* and *United States* v. *American Tobacco Co.*, 221 U. S. 1 and 106, contain no sugges-

[1] See also p. 470, *post.*

tion that the decisions of the court in the *Trans-Missouri* and *Joint Traffic Cases* were not correct in holding the combinations involved to be illegal while applying the rule that the statute should be reasonably construed.

The Sherman Law prohibits the creation of a single dominating control in one corporation whereby natural and existing competition in interstate trade is suppressed; such prohibition extends to the control of competing interstate railroads effected by a holding company as in the *Northern Securities Case* and to the purchase by one of two competing railroad companies of a controlling portion, even if not, as in this case, a majority of the stock of the other.

The Sherman Law, in its terms, embraces every contract or combination in form of trust or otherwise or conspiracy in restraint of interstate trade.

Congress is supreme over interstate commerce, and a combination which contravenes the Sherman Law is illegal although it may be permissible under, and within corporate powers conferred by, the laws of the State where made.

Courts should construe the Sherman Law with a view to preserve free action of competition in interstate trade, which was the purpose of Congress in enacting the statute.

Competition is the striving for something which another is actively seeking and wishes to gain.

Competition between two transcontinental railway systems such as the Union Pacific and Southern Pacific includes not only making of rates but the character of service rendered and accommodation afforded; and the inducement to maintain points of advantage in these respects is greater when the systems are independent than when the corporation owning one of the systems also dominates and controls the other.

The Union Pacific and Southern Pacific are competing systems of interstate railways and their consolidation by the control of the latter by the former through a dominating stock interest does, as a matter of fact, abridge free competition, and is an illegal restraint of interstate trade under the Sherman Law.

In this case *held*, that while there was a great deal of non-competitive business, a sufficiently large amount of competitive business was affected to clearly bring the combination made within the purview of the Sherman Law.

In this case also *held*, that the necessity of the Union Pacific to obtain an entrance to San Francisco and other California points over the lines of the Southern Pacific was not such as to justify the combination complained of in this case in view of the provisions for a contin-

uous railroad to the Pacific Coast and for interchange of traffic without discrimination contained in the acts of July 1, 1862, 12 Stat. 489, 495, § 12, c. 120, and of July 2, 1864, 13 Stat. 356, 362, § 15, c. 216.

Doubtless courts could restrain one railroad constructed under the acts of July 1, 1862, and July 2, 1864, from making discriminations, contrary to the provisions of those acts in regard to interchange of traffic, against another railroad also constructed under those acts.

The obligation to keep faith with the Government in regard to management of railroads constructed under acts of Congress continues notwithstanding changed forms of ownership and organization, as does also continue the legislative power of Congress concerning such railroads.

Although a railroad corporation may lawfully acquire that portion of another railroad which connects, but does not compete, with any part of its own system, it may not acquire the entire system a substantial portion of which does compete with its lines.

The effect of such a purchase and its legality under the Sherman Law may be judged by what was actually accomplished, and the natural and probable consequences of that which was done.

In determining the validity of a combination the court may look to the intent and purpose of those conducting the transaction and to the objects had in view.

While in small corporations a majority of stock may be necessary for control, in large corporations, where the stock is distributed among many stockholders, a compact united ownership of less than half may be ample to control and amount to a dominant interest sufficient to effect a combination in restraint of trade within a reasonable construction of the Sherman Law.

In applying the general rules as to relief under the Sherman Law as declared in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, the court must deal with each case as it finds it; and where the combination has been effected by purchase by one corporation of a dominant amount of stock of its competitor the decree should provide an injunction against the right to vote stock so acquired, or payment of dividends thereon except to a receiver, and any plan for disposition of the stock should be such as to effectually dissolve the unlawful combination.

Whether the decree can provide for the purchase by the Union Pacific of such portions of the Southern Pacific as are only connecting and are not competitive and which effect a continuous line to San Francisco, not now determined; but leave granted to the District Court to consider any plan proposed to effect such results.

Unless plans for dissolution are presented to, and affirmed by, the District Court within a reasonable period, in this case three months, that court should proceed to dissolve the combination by receiver and sale.
The decree below, dismissing the bill generally, being affirmed by this court as to all matters other than the purchase of Southern Pacific stock, is reversed in part and the District Court retains its jurisdiction over the cause to see that the decree outlined by this court in this opinion is made effectual. (See also p. 470, *post.*)
188 Fed. Rep. 102, reversed in part.

THE facts, which involve the validity under the Sherman Anti-trust Act of 1890 of the purchase by the Union Pacific Railroad Company of a dominant interest of the stock of the Southern Pacific Company, and whether the same was a combination in restraint of interstate commerce within the purview of the act, are stated in the opinion.

Mr. Cordenio A. Severance, The Attorney General and *Mr. Frank B. Kellogg,* for the United States, appellant:

The maintenance of free competition among railways has become the settled policy of the Nation.

The Interstate Commerce Act, in its provisions against contracts, agreements, or combinations between common carriers for pooling, enforces the competitive principle.

The Sherman Law, as construed by the courts, is directed against all attempts to suppress competition among interstate carriers or to monopolize interstate commerce. *National Cotton Oil Co.* v. *Texas,* 197 U. S. 115; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *United States* v. *Standard Oil Co.,* 173 Fed. Rep. 177; *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505; *United States* v. *Trans-Missouri Freight Ass'n,* 166 U. S. 290.

This policy has found expression in the constitutions and laws of thirty-seven States and two Territories.

The courts have recognized and enforced the policy, both under statutory and constitutional provisions, and also in the absence of such provisions. *Central R. R. Co.*

v. *Collins*, 40 Georgia, 582; *Clarke* v. *Central R. & B. Co.*, 50 Fed. Rep. 338; *Commonwealth* v. *South Penn Road*, 1 Pa. Co. Ct. Rep. 214; *Continental Securities Co.* v. *Interborough R. T. Co.*, 165 Fed. Rep. 945; *Currier* v. *Ry. Co.*, 48 N. H. 322; *East St. Louis Connecting Ry.* v. *Jarvis*, 92 Fed. Rep. 735; *East Line and Red River Co.* v. *Texas*, 75 Texas, 434; *Edwards* v. *Southern Ry. Co.*, 66 S. Car. 277; *Gulf, Col. & S. Fe R. R. Co.* v. *Texas*, 72 Texas, 404; *Hamilton* v. *Savannah, &c. Ry.*, 49 Fed. Rep. 412; *Langdon* v. *Branch*, 37 Fed. Rep. 449; *Louisville & Nash. R. R. Co.* v. *Kentucky*, 97 Kentucky, 675; *S. C.*, 161 U. S. 677; *Morrill* v. *Railway Co.*, 55 N. H. 531; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 646; *Penn. R. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 374; *State* v. *Vanderbilt*, 37 Oh. St. 590; *Stockton* v. *Central R. R. of N. J.*, 50 N. J. Eq. 52; *Tex. & Pac. Ry. Co.* v. *So. Pac. Ry.*, 41 La. Ann. 970; *Yazoo &c. Ry. Co.* v. *Southern Ry. Co.*, 83 Mississippi, 746.

It is immaterial that one of two competing roads may be organized under the laws of another State or situated beyond the borders of the State having the prohibition. *Currier* v. *Ry. Co.*, 48 N. H. 322; *Investigation into Union Pacific and Southern Pacific*, 12 I. C. C. Rep. 347; *Morrill* v. *Railway Co.*, 55 N. H. 531; *Union Pacific* v. *Mason City & Ft. Dodge Ry. Co.*, 199 U. S. 160; *United States* v. *Union Pacific R. R. Co.*, 188 Fed. Rep. 121.

Prior to the acquisition of the stock of the Southern Pacific Company by the Union Pacific the lines of those two systems were competitive, and such acquisition, having eliminated such competition, was therefore in restraint of trade and in violation of the Anti-trust Act. *East St. Louis Connecting Ry.* v. *Jarvis*, 92 Fed. Rep. 735; *East Line and Red River Co.* v. *Texas*, 75 Texas, 434; *East Line and Red River Co.* v. *Rushing*, 69 Texas, 306; *Gulf, Col. & S. Fe R. R. Co.* v. *Texas*, 72 Texas, 404; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244; *Kimball* v. *A., T. & S. F. Ry. Co.*, 46 Fed. Rep. 888; *Louis. & Nash. R. R.*

Co. v. *Kentucky*, 97 Kentucky, 675; *S. C.*, 161 U. S. 677; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 646; *Penna. R. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 374; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *State* v. *Montana Ry. Co.*, 21 Montana, 221; *State* v. *Vanderbilt*, 37 Oh. St. 590; *Stockton* v. *Central R. R. of N. J.*, 50 N. J. Eq. 52; *Tex. & Pac. Ry. Co.* v. *Southern Pacific Ry.*, 41 La. Ann. 970; *United States* v. *Am. Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 302; *United States* v. *Trans-Missouri Freight Ass'n*, 58 Fed. Rep. 64; *United States* v. *Union Pac. R. R. Co. et al.*, 188 Fed. Rep. 110.

The clause in the Pacific Railroad Act authorizing the Central Pacific and the Union Pacific to consolidate their lines gave the Union Pacific no right to buy the Southern Pacific. *Louis. & Nash. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 646; *Un. Pac.* v. *Mason City & Ft. Dodge Ry. Co.*, 199 U. S. 160.

The acquisition of the controlling interest in the Southern Pacific system by the Union Pacific tended to suppress competition, and therefore was in restraint of trade; also tended to monopoly, and is in violation of the Sherman Act. *Harriman* v. *Northern Securities Co.*, 197 U. S. 244; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Penna. R. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 374; *Stockton* v. *Central R. R. of N. J.*, 50 N. J. Eq. 52; *United States* v. *Am. Tobacco Co.*, 221 U. S. 106.

The ownership by the Union Pacific of less than a majority of the stock in the Southern Pacific, Santa Fe, Northern Pacific, Great Northern, and San Pedro lines tended to suppress competition and create a monopoly and is inhibited by the Sherman Act. *Central R. R. Co.* v. *Collins*, 40 Georgia, 582; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 408; *Loewe* v. *Lawlor*, 208 U. S. 274; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 161 U. S. 677; *Northern*

Securities Co. v. *United States*, 193 U. S. 197; *Pearsall* v. *Great Northern Ry.*, 161 U. S. 646; *Penna. R. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 374; *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268; *Salt Co.* v. *Guthrie*, 35 Oh. St. 666; *Stockton* v. *Central R. R. of N. J.*, 50 N. J. Eq. 52; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 179; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290.

The fact that the Union Pacific has, since the commencement of this suit, sold the balance of its stock in the Great Northern and Northern Pacific and in the Santa Fe is no reason why an injunction should not be granted. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290.

The control of the San Pedro road under the circumstances of this case tended to suppress competition and is void, although that line was not completed at the time of the acquisition of the stock therein. *Commonwealth* v. *Beech Creek R. R. Co.*, 1 Pa. Co. Ct. Rep. 223; *Farrington* v. *Stucky*, 165 Fed. Rep. 325; *Hamilton* v. *Savannah, Florida & W. Ry.*, 49 Fed. Rep. 412; *Hartford & New Haven R. R. Co.* v. *N. Y. & New Haven R. R. Co.*, 3 Robertson (N. Y. Superior Court), 411; *Inter. Com. Comm.* v. *Phila. & Reading R. R. Co.*, 123 Fed. Rep. 969; *Langdon* v. *Branch*, 37 Fed. Rep. 449; *Penna. R. R. Co.* v. *Commonwealth*, 7 Atl. Rep. 368, 374; *State* v. *Hartford & New Haven R. R. Co.*, 29 Connecticut, 538; *Thomsen* v. *Union Castle Mail Steamship Co.*, 166 Fed. Rep. 251; *United States* v. *Patterson*, 59 Fed. Rep. 280; *United States* v. *Standard Oil Co.*, 173 Fed. Rep. 177; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The combination of steamship lines between American and foreign ports for the purpose of suppressing competition is within the inhibitions of the Sherman Act. *Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed. Rep. 251.

The Government's brief contains a synopsis of the

constitutional and statutory provisions of the several States and Territories on the subject of parallel and competing lines.

Mr. N. H. Loomis and *Mr. P. F. Dunne* for appellees:

The object which the Union Pacific had in view in acquiring an interest in the Southern Pacific, was not to suppress competition or to obtain a monopoly, but to secure a permanent relationship with the Southern Pacific which would insure for it a perpetual through line to San Francisco, as contemplated by Congress, and give to it as well, an entrance into all the traffic producing centers of California.

As to the conception which Congress and the public had, of a single, indivisible line of railroad extending from the Missouri River, with continuous rails to the Pacific Ocean, see act of July 1, 1862. Not only did Congress provide for the permanent physical continuity of the proposed railroads, but gave power to any two or more of them to consolidate and thus place themselves under a single management. §§ 10, 12, 16, act of July 1, 1862, 12 Stat. 497; § 16, act of July 2, 1864, 13 Stat. 362. See *Ames* v. *Kansas*, 111 U. S. 449.

The hope and expectation of a single, indivisible line of railroad from the Missouri River to the Pacific Ocean could not be fully realized as long as the ownership was vested in separate corporations and the operation in different managements.

It is clear from the testimony that the officials of the Union Pacific regarded the Southern Pacific not as a competitive, but as a connecting line.

The testimony of the witnesses and the surrounding circumstances demonstrate that the object and intent of purchasing the stock of the Southern Pacific, was to protect the integrity of the through line from the Missouri River to the Pacific coast and to procure for the Union

Pacific a permanent entrance into interior California points; it was not to obtain a competing line or to stifle competition.

This intent was shown by betterments. As to deducing intent from actions of the parties see *United States* v. *American Tobacco Company*, 221 U. S. 106.

The Southern Pacific was not bound to agree to joint tariffs under any law in force when the stock purchase was made.

There was no law in 1901 by which that company could be forced to grant other than local rates between Ogden and San Francisco on traffic tendered to it by the Union Pacific; nor did the Pacific Railroad Act of July 2, 1864, which required the Union Pacific and the Central Pacific, as well as the other roads included therein, to be operated and used for all purposes of communication and travel so far as the public and Government are concerned as one continuous line extend to requiring joint tariffs. *L. R. &c. R. R. Co.* v. *E. T. Va. & G.*, 2 I. C. C. Rep. 456, and 3 I. C. C. Rep. 1, 6.

This court has held that the fixing of rates is a legislative power which cannot be exercised by the courts. *The Express Cases*, 117 U. S. 1, 28; *Central Stock Yards* v. *Louisville &c. Ry. Co.*, 192 U. S. 568, 571; *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pacific R. Co.*, 51 Fed. Rep. 465, 474; *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.*, 63 Fed. Rep. 775.

The want of power to compel railroads to enter into such agreements led to the adoption of the Hepburn Act, §§ 15, 34 Stat. 590, and the Interstate Commerce Commission was authorized to establish through routes, fix rates and to determine the division of the through rate between connecting carriers; but as to the law prior thereto, see *Southern Pacific* v. *Int. Com. Comm.*, 200 U. S. 536, 553; *Chicago & N. W. Ry.* v. *Osborne*, 52 Fed. Rep. 915.

The want of legal power on the part of the Union

Pacific to compel the Southern Pacific to recognize the usual incidents of a through route and the discretion possessed by the Southern Pacific to do as its own welfare might dictate with respect to through rates, gave to that company additional advantages, and made it possible for the Southern Pacific to more effectively control the situation.

The so-called Portland route to San Francisco is not a practicable one. Union Pacific officials had frequently considered the opening of the Portland gateway for San Francisco traffic, but had always concluded that it would be an unprofitable move and therefore it was not done. One serious objection was the length of the line. Portland is substantially the same distance from Omaha as San Francisco is, and the rate to San Francisco through Portland would have to be the same as the rate via the short, direct line through Ogden; and the rate to Portland was the same as the rate to San Francisco. The Union Pacific would receive no greater revenue for hauling freight through Portland to San Francisco than it would for the same freight delivered at Portland.

As a matter of fact the Portland route to San Francisco has never been used, although it has been open, physically, since 1884.

The most conclusive point, showing that the Portland route to San Francisco is and always has been, an impracticable one, is the fact that the Northern rail lines terminating at Seattle, Tacoma and Portland have never been able to carry any substantial amount of transcontinental traffic to or from San Francisco.

The Government's argument is that the Portland route to San Francisco could have been used by the Union Pacific, in view of the successful operation of the Sunset line between New York and San Francisco via New Orleans by the Southern Pacific. The conditions surrounding the operation of the Sunset route are so dissim-

ilar, however, that it cannot be regarded as a parallel case. In the first place it is operated under a single management from New York to San Francisco and California business is given preferred attention. The freight is carried by boat from New York to New Orleans without stop, the California freight quickly transferred to cars waiting upon the wharves and transported in trainload lots to Los Angeles and San Francisco. It is a service which cannot be duplicated by any other broken water and rail line.

The traffic upon which complainant mainly relies to establish competitive relations between the Union Pacific and the Southern Pacific in 1901, was traffic between the Atlantic seaboard and the middle west on the one hand and California points on the other. As to all this traffic the Union Pacific and Southern Pacific were not competitors, but connections, and in a sense, partners.

A railroad is not a competitor of its connections on business handled by them jointly under a through tariff. *Southern Pacific* v. *Interstate Commerce Commission*, 200 U. S. 536.

In the *Standard Oil Case*, 221 U. S. 1, 80, this court recognized the legality of combining various pipe lines, in order to make a continuous line, and declared that an agreement or combination so to do would not be repugnant to the Sherman Act.

Some of the reasons why Union Pacific was not a competitor of Southern Pacific's Sunset route are that it was a connection of the Southern Pacific, handling through business on a joint tariff, to which the Southern Pacific had voluntarily agreed. In entering upon this relationship and agreeing to the joint tariff, the Union Pacific knew that the Southern Pacific possessed another line via New Orleans and that it would endeavor to route traffic that way and get the long haul whenever circumstances permitted it. But notwithstanding that fact the Union

Pacific was willing to continue the relationship. As a matter of fact it had no choice about the matter; it was compelled to submit to these conditions. The Southern Pacific was not only a partner but a dominant partner—a partner with which the Union Pacific was required to associate or go out of business. With no rails of its own into California and no other railroad but the Southern Pacific to handle its California traffic, it was impossible for it to occupy the position of an independent, hostile competitor.

The same principle is also controlling when we consider that as between the Union Pacific and the Southern Pacific, San Francisco is a local non-competitive point on the Southern Pacific, situated eight hundred miles distant from the western terminus of the Union Pacific.

In the next place, the Government's argument assumes that two parts of the same railroad can compete with each other; that is to say, that that portion of the Southern Pacific Railroad extending from San Francisco to Ogden can compete with that portion thereof extending from San Francisco to New York.

This assumption cannot be correct, as it is obvious that a railroad company cannot compete with itself.

Furthermore, the Union Pacific was a constituent member of the Ogden route before the purchase, and it continued as such thereafter. If the Ogden route, including the Union Pacific, competed with the Sunset route before the purchase, it still competes with it; if it did not compete with it before the purchase, it does not compete with it now. Competitive conditions between the two routes have not been changed by placing the Union Pacific and the Southern Pacific under a common management.

As the Southern Pacific controlled the routing of California business, and the Union Pacific could obtain the business through the friendly interposition of that company only, it cannot be maintained that the Union Pacific

was a competitor of the company it was dependent upon to get the business.

If the Southern Pacific was a competitor of the Union Pacific on California business, because of the Sunset route, and the Union Pacific cannot own the stock of the Southern Pacific, then it will be impossible for any of the large railroads of the country to extend their lines by purchase or consolidation. Every railroad with more than one gateway is in the same predicament. If the Government were devising a scheme to prevent the consolidation of all railroads, regardless of whether they were parallel or connecting lines, a better one could not have been concocted than the theory adopted in this case.

Another reason why the Union Pacific should not be considered as a competitor of the Southern Pacific on transcontinental business to and from California points is that it is but one link in the all-rail through line from the Atlantic seaboard to San Francisco, while the Southern Pacific has a continuous line from New York to San Francisco, under a single management. The Union Pacific is dependent not only on the Southern Pacific on the west, but on its eastern connections as well, to fix a through rate or to maintain a through service; in itself it could do nothing without the voluntary coöperation of the lines extending east from Omaha or Kansas City.

If one line is the competitor of another merely because both of them happen to be links in systems of through routes which compete with each other, practically every railroad in the United States is a competitor of every other railroad in the United States, and under those conditions not one line could purchase or consolidate with another line because of its being a competitor.

Complainant's testimony as to the existence of separate soliciting agencies and of the consolidation of certain of those agencies subsequent to 1901 does not prove that the

Southern Pacific and Union Pacific were in competition with each other.

All the large railroad systems in the United States have several gateways, representing different routes, through which their traffic may be handled; for instance, the New York Central, Pennsylvania and Baltimore & Ohio railroads have among others, their St. Louis and Chicago gateways; the Chicago, Milwaukee & St. Paul, its Omaha, Kansas City and St. Paul gateways; the Missouri Pacific, its Pueblo and El Paso gateways; the Southern Railway, its Memphis and New Orleans gateways; the Louisville & Nashville, its St. Louis, Memphis and New Orleans gateways.

It is the effort of soliciting agents to secure business through these different gateways, as varying circumstances require them to solicit in favor of the one or the other, which induces the belief that there is competition between the routes represented by them, even though the agents may be working in the interests of the same carrier. A brief consideration of the proposition will disclose its fallacy.

Complainant's witnesses who expressed the opinion that the Union Pacific and Southern Pacific were competing upon California business did so entirely upon the assumption that the rivalry of soliciting agents was the competition of railroads. The testimony shows, however, how fallacious such testimony is and demonstrates that the strife for business may merely be the competition which is constantly going on between agents in the service of the same principal.

As the work of soliciting agents against each other may be in pursuance of a common employment and the results of their labors for the benefit of the same railroad or combination of connecting railroads, testimony as to the rivalry of soliciting agents cannot be used to show the existence of competition between the routes which they represent.

The fact that two railroads have separate soliciting agents does not necessarily prove that the railroads they represent are competitors.

The Government itself asserts that the Union Pacific and Southern Pacific are not competing at the present time and yet it appears that there are separate soliciting agencies representing those companies at New York and San Francisco and other points.

The other alleged competitive routes of minor importance did not make the Union Pacific and the Southern Pacific competitors in any direct and substantial sense.

In order to bring the competition within the inhibition of the Sherman Act, it must be direct and substantial. Competition which is indirect and remote is not competition within the meaning of the statute; traffic unsubstantial in amount is not included within the terms of the law. When the Government seeks to set aside transactions as in restraint of trade and commerce, the burden rests upon it not only to prove the restraint of commerce, but the restraint of a substantial volume of commerce. It must affirmatively show that the competition was of some practical importance and that the restraint of commerce involved was unreasonable.

The Sherman Act was not intended to apply to combinations whose effect upon interstate commerce was indirect or incidental only, or which might remotely affect that commerce. *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 568.

This court puts contracts which only indirectly and incidentally restrain interstate commerce upon the same basis with respect to validity as legislation of the States, of which there are numerous examples, which incidentally and indirectly affect interstate commerce and yet are valid because it is not a direct regulation of such commerce. *Anderson* v. *United States*, 171 U. S. 604, 615, and

Addyston Pipe and Steel Co. v. *United States*, 175 U. S. 211, 229.

This court held in one of the most important and far-reaching decisions ever announced by it, that the Sherman Act does not prohibit every contract, combination, etc., in restraint of trade, but only those which unreasonably restrain trade and commerce. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Am. Tobacco Co.*, 221 U. S. 106; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179; *Phillips* v. *Cement Co.*, 125 Fed. Rep. 594; *Kimball* v. *Atchison &c. Ry. Co.*, 46 Fed. Rep. 888; *State* v. *Cent. of Ga. Ry.*, 109 Georgia, 716.

Treating all of the traffic over the various routes of minor importance as competitive and considering it in the aggregate, it is a mere bagatelle when compared with the entire traffic of the Union Pacific and the Southern Pacific. It amounts to only 0.88 per cent of the tonnage of the Southern Pacific and to only 3.10 per cent. of the tonnage of the Union Pacific, while the revenue of the Southern Pacific from this traffic aggregates only 1.25 per cent of its total revenue, an amount which it is not conceivable that the Union Pacific would have cared to invest millions in Southern Pacific stock to suppress. See *Rogers* v. *Nashville &c. Ry. Co.*, 91 Fed. Rep. 299, and cases *supra*.

The purchase of the stock of the Northern Pacific and the Santa Fe by defendants, and the settlement of right of way controversies with the Clark interests, which resulted in the joint construction and ownership of the San Pedro road, were not acts performed with the object of suppressing competition or of acquiring a monopoly, nor did they have that effect.

A review of the entire record demonstrates that a monopoly has not been created, that there has been no suppression of competition, and that there was no conspiracy to effectuate either purpose. The record shows, on the

other hand, that the interest which the Union Pacific acquired in the Southern Pacific has been of direct and substantial benefit to trade and commerce.

The Union Pacific ownership of Southern Pacific stock was not a control, and did not import, as a matter of law, the power in any view of the case to restrict competition. The Union Pacific merely became a minority stockholder, having by its first purchase acquired only about 37½ per cent of the stock and never acquired a majority. While the Union Pacific may have been able to keep control with less than a majority of stock there was always a possibility that it could not do so. Stock control condemned by this court has been of an actual majority. *Pearsall* v. *Great Northern Ry.*, 161 U. S. 671; *Northern Securities Case*, 120 Fed. Rep. 726; *S. C.*, 193 U. S. 106; Noyes on Intercorporate Relations, § 294; and see *Pullman Co.* v. *Mo. Pac. R. R.*, 115 U. S. 578.

The acquisition and ownership by the Union Pacific of the Huntington stock by out and out sale to it by a stockholder in the market, is not, as such, within the power of Congress to regulate, under the commerce clause of the Constitution. *United States* v. *Knight Co.*, 156 U. S. 1.

The acquisition and ownership of property by a corporation or citizen of a State is not interstate commerce. The Union Pacific is a Utah corporation and had power to purchase stock of the Southern Pacific. *Nat. Bank* v. *Matthews*, 98 U. S. 628; *St. Louis R. R.* v. *Terre Haute R. R.*, 145 U. S. 407; *Paul* v. *Virginia*, 8 Wall. 168.

A state corporation is subject to regulation by Congress only to the extent and by the measure of its engagement in interstate commerce. *Employers' Liability Cases*, 207 U. S. 463, 499. See *Ashley* v. *Ryan*, 153 U. S. 436, 442; *Louisville & Nashville Case*, 161 U. S. 677; *Mobile &c. R. R. Co.* v. *Mississippi*, 210 U. S. 187, 202.

The authority of the several States to permit railroads within their respective territory to consolidate on terms

prescribed by each is inconsistent with the assertion of a power of Congress to the same effect, as it could only prescribe a uniform rule.

The purchase by the Union Pacific of the Huntington stock by out and out sale is not within the purview of the Sherman Law. An out and out sale is quite distinguishable from a collateral stipulation or covenant running with the sale.

The combination or conspiracy prohibited by the Sherman Law is essentially a process terminable in future. It is not like a sale completed when made. *Mitchell* v. *Reynolds*, 1 P. Wms. 181. For some of these collateral agreements to sales see *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Nordenfeldt* v. *Maxim*, App. Cas., 1904, 535; *Bancroft* v. *Embossing Co.*, 72 N. H. 407; *Packet Co.* v. *Bay*, 200 U. S. 179.

Something more than the acquisition of a competing property is necessary to bring the purchaser and seller within the Sherman Law. *Shawnee Compress Co. Case*, 209 U. S. 434; *Chemical Co.* v. *Provident Co.*, 64 Fed. Rep. 950; *The Greene Case*, 52 Fed. Rep. 115; *Roller Co.* v. *Cushman*, 143 Massachusetts, 355, 364; *Oakdale Co.* v. *Garst*, 28 Atl. Rep. 973. See also *Harriman* v. *Menzies*, 115 California, 19; *Collins* v. *Locke*, L. R., 4 App. Cas. 674; *Skrainka* v. *Scharring-Hausen*, 8 Mo. App. 522; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Cohen* v. *Berlin*, 56 N. Y. Supp. 558; *Kellog* v. *Larkin*, 3 Pinney (Wis.), 123; *Dolph* v. *Troy Co.*, 28 Fed. Rep. 554; *Mathews* v. *Associated Press*, 32 N. E. Rep. 981; *Vinegar Co.* v. *Voehrbach*, 148 N. Y. 58; *Macauley* v. *Tierney*, 19 R. I. 255; *Bohn* v. *Mfg. Co.*, 54 Minnesota, 233; *Cote* v. *Murphy*, 159 Pa. St. 420; *Ins. Co.* v. *Bd. of Underwriters*, 67 Fed. Rep. 317; *Nat'l Ass'n* v. *Cumming*, 170 N. Y. 315; *Vogelen* v. *Ganter*, 167 Massachusetts, 92, opinion of Holmes, J.

A competitor may be driven out by lawful competition, *Mogul S. S. Co.* v. *McGregor*, L. R., 23 Q. B. D. 612;

Whitwell v. *Continental Tobacco Co.*, 125 Fed. Rep. 459; *Bonsack* v. *Smith*, 70 Fed. Rep. 388, and if so he may also lawfully be bought out by voluntary contract.

Mere size or aggregation by purchase does not necessarily amount to violations of the Sherman Law.

The same stockholders may lawfully own a controlling interest in each of two competing corporations. *Bigelow* v. *Calumet Co.*, 167 Fed. Rep. 704, 727.

MR. JUSTICE DAY delivered the opinion of the court.

The case was begun in the United States Circuit Court for the District of Utah to enforce the provisions of the so-called Sherman Anti-trust Act of 1890, 26 Stat. 209, c. 647, against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of the late Collis P. Huntington, who had formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares or about 37½% (subsequently increased to 46%) of the outstanding stock of the Southern Pacific Company. The stock is held for the Union Pacific Company by one of its proprietary companies, The Oregon Short Line Railroad Company. The Government contends that the domination over and control of the Southern Pacific Company given to the Union Pacific Company by this purchase of stock brings the transaction within the terms of the Anti-trust Act. A large amount of testimony was taken and the case heard before four Circuit Judges of the Eighth Circuit, resulting in a decree dismissing the bill. 188 Fed. Rep. 102.

Prior to the stock purchase in 1901 the Union Pacific

system may briefly be described as a line of railroad from the Missouri River to the Pacific coast, namely, from Omaha, Nebraska, or perhaps more strictly from Council Bluffs, Iowa, and from Kansas City, Missouri, to Ogden, Utah, and Portland, Oregon, with various branches and connections, and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by The Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line. The boat line from Portland to San Francisco and to the Orient, The Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the State of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New Orleans through Louisiana, Texas, New Mexico, Arizona, California and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and operated by the Southern Pacific, and later the same ships entered the port of Gal-

veston, where also the Southern Pacific reached tidewater, and it had branches extending to various points in northern Texas connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of The Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles in length and connecting at the latter place with the Union Pacific and The Denver & Rio Grande Railroad Company's line. It also had various branches in and about California aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama which, with the Panama Railroad and its boats, constituted the so-called Panama Route.

The contention of the Government is that, prior to the stock purchase, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce, and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific has eliminated competition between these two systems, and that such domination makes the combination one in restraint of trade within the meaning of the first section of the act of Congress of July 2, 1890, and the transaction an attempt to monopolize interstate trade within the provisions of the second section of the act.

In view of the recent consideration of the history and meaning of the act (*Standard Oil* and *Tobacco Cases*, 221 U. S. 1 and 106, respectively) it would be superfluous to enter upon any general consideration of its origin and scope. In certain aspects the law has been thoroughly considered and its construction authoritatively settled, and in determining the present controversy we need but

briefly restate some of the conclusions reached. The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505. The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof. *United States* v. *Joint Traffic Association, supra.* In that case an agreement between competing interstate railroads for the purpose of fixing and maintaining rates was condemned.

"It is," said the court (p. 571), "the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In the *Northern Securities Co.* v. *United States*, 193 U. S. 197, this court dealt with a combination differing in character from that considered in the *Trans-Missouri* and *Joint Traffic Cases*, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice Harlan, announcing the affirmance of the decree of the Circuit Court said (p. 337):

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in

other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

Mr. Justice Brewer, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended to reach and destroy those contracts which were in direct restraint of trade, unreasonable and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy, he declared, might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads, or, viewing the possibilities of combination, the control of the whole transportation system of the country, and, in concluding his concurring opinion, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law and within the letter and spirit of the statute and the power of Congress."

Of the Sherman Act and kindred statutes, this court, speaking by Mr. Justice McKenna, said in *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129:

"According to them, competition not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375."

In the recent discussion of the history and meaning of the act in the *Standard Oil* and *Tobacco Cases* this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished, and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule and there was no suggestion that they had not been correctly decided. In the *Tobacco Case*, after referring to the previous decision in the *Standard Oil Case* and the decisions in the *Trans-Missouri* and *Joint Traffic Cases*, the doctrine was tersely summarized by the Chief Justice, speaking for the court, as follows (p. 179):

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain

the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect."

We take it therefore that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. *Swift & Co.* v. *United States*, 196 U. S. 375.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the *Northern Securities Case*, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly

held this general phraseology embraces all forms of combination, old and new. "In view of the many new forms of contracts and combinations," said the Chief Justice in the *Standard Oil Case* (p. 59), "which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation." A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other, could hardly be conceived. If it is true, as contended by the Government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company and thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was in our opinion within the terms of the statute.

That the purchase was legal in the State where made and within corporate powers conferred by state authority constitutes no defense, if it contravenes the provisions of the Anti-trust Act, enacted by Congress in the exercise of supreme authority over interstate commerce. *Northern Securities Co.* v. *United States*, *supra*, 334; *Standard Oil Co.* v. *United States*, *supra*, 68; *United States* v. *American Tobacco Co.*, *supra*, 183.

It is said, however, and this was the view of the majority of the Circuit Judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads, and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with

practical unanimity, expressed the view that prior to the stock purchase in question the Union Pacific and Southern Pacific systems were in competition, sharp, well-defined and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific through its agents, advertisements and literature had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement, fixed at the same figure whichever route was used and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. *United States* v. *Joint Traffic Association, supra,* 577. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall* v. *Great Northern Railway Co.,* 161 U. S. 646, 676; *United States* v. *Joint Traffic Association, supra.*

It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a

negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific Coast did not prevent competition for this traffic. The Union Pacific and its connections were engaged in the same carrying trade, and as a matter of fact were competing for that trade, by all the usual means of competition resorted to by rival railroad systems. As this court said, speaking by Mr. Justice Holmes, in *Swift & Co.* v. *United States*, *supra*, 398: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." That commerce, as conducted from the East to the Pacific Coast, was in a substantial part the subject matter of rivalry and competition between these two systems. Since the stock transfer the companies have common officers and the rival soliciting agencies have been for the most part abandoned.

It is contended that the Union Pacific was but a connecting road and really had no line to San Francisco, but was dependent upon the Southern Pacific for such terms as it could make over the old Central Pacific line from Ogden to San Francisco. The facts disclose, as we have already said, that the Union Pacific had a line to Portland by way of the Oregon Short Line and the Oregon Railroad & Navigation Company, and thence to San Francisco by steamboat connection. It may be admitted that this was a much longer route than by way of the Ogden connection, and that as a practical matter nearly all of the freight intended for San Francisco and nearby points went over the Ogden route, nevertheless the Portland route was a factor in rate making to the coast, and the testimony shows that the Union Pacific and the Southern Pacific up to the time of the sale of the stock had been working for many years under a satisfactory arrangement as to rates. It is going too far to say that the Union Pacific was entirely at the

mercy of the Southern Pacific in making rates for freight by way of the Ogden connection because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time. One of the reasons for the Central Pacific leasing its lines to the Southern Pacific, as set forth in the lease, was that the Union Pacific had secured control of the Oregon Short Line and thereby obtained an outlet to the Pacific, other than over the Central Pacific, "and thus in that respect placed itself in opposition to the interests of the Central Pacific," and that it was "not only to the best interests of, but absolutely necessary that, the Central Pacific Railroad Company, in order to maintain itself against these diversions (of the Union Pacific and others), should be operated in connection with a friendly through line to the waters of the Atlantic."

Nor do we think it can be justly said that because of the connection with the Rio Grande road at Ogden the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. In this connection it is said that since the consolidation, notwithstanding the former published rates are maintained, the favoring attitude of the Southern Pacific to the Union Pacific practically destroyed the carrying trade from Ogden to the East for the Rio Grande system and necessitated the construction by the latter road of a new connection for California points, and that

such would have been the fate of the Union Pacific upon disagreement as to rates with the Southern Pacific. In reference to this point we think it is pertinent to consider the acts of Congress known as the Pacific Railroad Acts. These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line" (12 Stat. 489, 495, act of July 1, 1862, c. 120, § 12), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others . . ." (13 Stat. 356, 362, act of July 2, 1864, c. 216, § 15). They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the Interstate Commerce Acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others, and the purpose of Congress

to secure a continuous line of road, operating from the Missouri River to the Pacific Coast as one road, is further emphasized in the act of Congress of June 20, 1874, c. 331, 18 Stat. 111, making it an offense for any officer or agent of the companies authorized to construct the roads or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of or adverse to any or either of said companies. Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts (*Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 603, 604), and might possibly have resulted in a forfeiture of all rights under the acts of Congress. The obligation to keep faith with the Government continued, as did the legislative power of Congress concerning these roads, notwithstanding changed forms of ownership and organization. *Union Pacific Railroad Company* v. *Mason City &c. Railroad Co.*, 199 U. S. 160.

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection via Ogden and to avoid the situation which has been termed the "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business

in California, as it is apparent that much of it would not have gone over the "Sunset" route of the Southern Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the State of California, but this case is not to be decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done, and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific Coast points, with various branches and connections, besides a steamship line from San Francisco to Panama and from San Francisco to the Orient and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road.

In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view. *Swift & Co.* v. *United States, supra,* 396; *United States* v. *St. Louis Terminal,* 224 U. S. 383, 395. It appears that at the time the Union Pacific was

about to raise the means to effect the Southern Pacific stock purchase it authorized the issuance of $100,000,000 of bonds "for the purpose of meeting present and future financial requirements of the Company," provision being made for the use of the proceeds from $40,000,000 of this amount in the purchase of the Southern Pacific stock, with no designation whatever as to the purpose to which the balance, $60,000,000, should be applied. It is said that the remaining $60,000,000 were intended to be used in the acquisition of a part interest in the railroad system of the Chicago, Burlington & Quincy Railway Company, in view of the imminent probability of the purchase of that system by the Northern Pacific Railway Company and the Great Northern Railway Company. As a matter of fact, the Northern Pacific and Great Northern having each secured a half interest in the Burlington, the Union Pacific did acquire a large amount of the Northern Pacific stock with this $60,000,000. The failure to secure control of the Northern Pacific by acquiring a majority of its common stock resulted in the formation of the Northern Securities Company, terminating in the litigation of the *Northern Securities Case* and the judgment of this court reported in 193 U. S. 197. When that combination was declared illegal the Union Pacific interests undertook to compel a return of the Northern Pacific stock which they had turned over to the Northern Securities Company and opposed a distribution among the stockholders of the latter company of the stock of the Northern Pacific Company and the Great Northern Company which had been put into the combination. That attempt was dealt with in *Harriman* v. *Northern Securities Company*, 197 U. S. 244, and of the effect of the return of the Northern Pacific stock to the Union Pacific interests instead of the distribution of the stock and assets of the Northern Securities Company among its stockholders this court said (p. 297):

"It is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.

"The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition."

In view of the testimony we think the evident purpose of issuing the $100,000,000 of bonds was to acquire a fund to be used for the acquisition of the stock of the Southern Pacific, a great competitive system, and also of the stocks of other competing roads.

After acquiring the Southern Pacific stock, Mr. Harriman, who dominated in the affairs of the Union Pacific, became President and Chairman of the Executive Committee of the Southern Pacific Company, with the same ample power which he had in like positions in the Union Pacific Company and the companies owned and controlled by it. These facts cannot be lost sight of in determining the object and scope of the transaction in question, which resulted, as we have said, in that unified control which has in its power the suppression of competition.

But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent. which was afterwards somewhat increased and diminished until about 46% of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is

ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46% is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest.

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade within the meaning of the Sherman Act, the question remains, What should be the relief in such circumstances? The remedies provided in the statute, generally speaking, were said by this court in the *Standard Oil Case*, *supra*, to be two-fold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In applying this general rule of relief we must deal with each case as we find it, and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as

to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the court.

As the court below dismissed the Government's bill, it was unnecessary there to consider the disposition of the shares of stock acquired by the Union Pacific Company, which acquisition, we hold, constituted an unlawful combination in violation of the Anti-trust Act. In order to effectually conclude the operating force of the combination such disposition shall be made subject to the approval and decree of the District Court, and any plan for the disposition of this stock must be such as to effectually dissolve the unlawful combination thus created. The court shall proceed, upon the presentation of any plan, to hear the Government and defendants and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views herein expressed.

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri River to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the Government or any party in interest, if so desiring, from presenting to the District Court a plan for accomplishing

this result, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the District Court within three months from the receipt of the mandate of this court, failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

The Government has appealed from the decree which is a general one dismissing the bill. So far as concerns the attempt to acquire the Northern Pacific stock and the stock of The Atchison, Topeka & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles & Salt Lake Railroad Company, and other features of the case which were dealt with and disposed of by the decree and opinion of the court below, it is sufficient, without going into these matters in detail, to say that as to them we find no reason to disturb the action of the court below, but for the reasons stated the decree should be reversed and one entered in conformity to the views herein expressed, so far as concerns the acquisition of the Southern Pacific stock.

Reversed in part, the District Court to retain its jurisdiction to see that the decree above outlined is made effectual.

MR. JUSTICE VAN DEVANTER took no part in the hearing or determination of this case.

For opinion on motion to amend the mandate see p. 470, *post.*

LOUISIANA NAVIGATION COMPANY, LIMITED, *v.* OYSTER COMMISSION OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 40. Argued November 6, 1912.—Decided December 2, 1912.

This court cannot be called upon to review the action of the state court by piecemeal, and even if the judgment does finally dispose of some elements of the controversy, unless it is final on its face as to the entire controversy this court will not review it.

On the question of finality the form of the judgment is controlling, and that form cannot be disregarded in order to ascertain whether the judgment is a final one according to state law.

This court has the power and duty when reviewing the final judgment of a state court to pass on all Federal controversies in the cause irrespective of how far such questions were concluded by the state law during the litigation and before a final judgment reviewable here was rendered.

The dismissal of the writ of error for want of finality of the judgment in this case is on the presumption that the case otherwise involves Federal questions reviewable by this court.

Writ of error to review, 125 Louisiana, 740, dismissed.

THE facts, which involve the jurisdiction of this court of writs of error to state courts, and what constitutes a final judgment reviewable by this court, are stated in the opinion.

Mr. Thomas Gilmore and *Mr. E. N. Pugh*, with whom *Mr. J. C. Gilmore* was on the brief, for plaintiffs in error.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, filed a brief for defendant in error, Conservation Commission of Louisiana.

Mr. John Dymond, Jr., filed a brief for defendants in error, E. C. Joullian Canning Company and Dunbars, Lopez & Dukate Co.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Supreme Court of Louisiana in this case reviewed the judgment of a trial court which dismissed the petition of the plaintiff because it stated no cause of action. The plaintiff in error here was plaintiff in the trial court and appellant in the court below. The suit was based on an alleged right to recover damages for slander of the title of plaintiff to described lands. Under the law of Louisiana, for the purpose of passing upon the exception of no cause of action, the case in substance became one petitory in its character—that is, one to try title to land. Treating the action as of that nature, the court below elaborately reviewed the averments of the petition and expressed the opinion that in some respects a cause of action was stated —that is, that there was allegation of title as to some of the land, and that there was no title alleged to other of the land involved. The court concluded as follows (125 Louisiana, 741, 755):

"We think, therefore, that plaintiff should be again afforded an opportunity to amend its petition by setting forth, specifically, the particular places, or portions of its property, upon which the alleged trespass has been committed, together with the time and manner of the trespass."

The judgment was as follows:

"It is ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded to the district court, to be there proceeded with in accordance with the views expressed in this opinion . . ."

Upon the theory that Federal questions were involved

within the cognizance of this court this writ of error to the judgment thus rendered was sued out. But as the judgment of the court below on its face is not a final one, it follows that a motion to dismiss must prevail. *Haseltine* v. *Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Missouri &c. Ry. Co.* v. *Olathe*, 222 U. S. 185.

The contention, however, is that the judgment below is final for the purpose of review by this court, because when the opinion of the Supreme Court of Louisiana is carefully weighed it will be found that that court practically finally disposed adversely to the title of the plaintiff of the substantial part of the lands involved in the suit and hence that the court in remanding the cause for further proceedings did so only as to other lands. But conceding this to be true, it does not justify the claim based on it. In the first place it is settled that this court may not be called upon to review by piecemeal the action of a state court which otherwise would be within its jurisdiction, and in the second place the rule established by the authorities to which we have referred is that on the question of finality the form of the judgment is controlling, and hence that this court cannot for the purpose of determining whether its reviewing power exists be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might by applying the state law be treated as final in character. Indeed it has been pointed out that the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its face final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 268.

The suggestion that the right to review by this court will be lost if it does not disregard the form of the judg-

ment and review the action of the court below concerning the title to land as to which the court below expressed opinions which as the law of the case will hereafter be binding upon it and upon other courts of the State of Louisiana, is without merit. We say this because the contention is but illustrative of the misconception which the argument involves which we have already pointed out. The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty in this court when a final judgment in form is rendered and the cause is brought here for review to consider and pass upon all the Federal controversies in the cause irrespective of how far it may be that by the state law such questions were concluded during the litigation and before a final judgment susceptible of review here was rendered. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 214.

Of course, for the purpose of disposing of the motion to dismiss upon the ground of the want of finality of the judgment we have taken it for granted for the sake of the argument that the case otherwise involved Federal questions within our power to review.

Dismissed for want of jurisdiction.

DEMING *v.* CARLISLE PACKING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 511. Submitted November 4, 1912.—Decided December 2, 1912.

Even though the record may present in form a Federal question the writ of error will be dismissed if it plainly appear that the Federal question is so unsubstantial and devoid of merit as to be frivolous.

In this case the only Federal question was based on the refusal of

the state court to remove the cause as to the non-resident defendants on the ground of fraudulent joinder of the resident defendant and is frivolous as shown by the fact that the trial court refused to nonsuit as to the resident defendant and there was a verdict against all.

Where the case is not removable before trial, plaintiff has the right to have the issues of fact and law raised determined in the state court having jurisdiction, and the power of the state court to so determine cannot be destroyed by defendants' claim that if the evidence had been rightly weighed the decision would have been different.

Where the state court has jurisdiction, the Federal court cannot deny the state court the right to exercise it.

The unsubstantial and frivolous character of the only Federal question presented in this case embraces the conclusion that the writ was prosecuted for delay.

The power which this court can exercise under one of its own rules depends upon the statute on which the rule is based.

Under Rule 23, which is based on § 1010, Rev. Stat., this court has the same power to award damages for delay where the writ of error is dismissed as where there is judgment of affirmance; and in this case five per cent. damages are imposed in addition to costs.

Writ of error to review, 62 Washington, 455, dismissed.

THE facts, which involve the jurisdiction of this court of writs of error to state courts, and the power of this court to award damages for delay where the writ of error is dismissed, are stated in the opinion.

Mr. Charles W. Dorr, *Mr. A. B. Browne*, *Mr. S. M. Bruce* and *Mr. Hiram E. Hadley*, for defendant in error, in support of the motion.

Mr. James A. Kerr and *Mr. E. S. McCord*, for plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Carlisle Packing Company, a corporation of the State of Washington, sued in a court of that State Deming and the two corporations who with him are the plaintiffs in error on this record. Deming was a citizen and resident of the State of Washington and the corporations were

alleged to be citizens of States other than Washington. The defendants were sued jointly for a violation by them of a contract alleged to have been jointly made for the purchase of salmon. There was a joint answer by the defendants putting at issue the material allegations of the complaint. There was a jury trial. When the Carlisle Company rested, motions for nonsuit were separately made on behalf of each of the defendants and overruled.

After the defendants had offered their proof and the case was ripe for submission, the counsel for the two corporate defendants presented a petition and bond for the removal of the cause to the proper Federal court and asked that the bond be approved and further proceedings be stayed. The asserted right to remove proceeded upon the assumption that Deming had been fraudulently joined as a defendant for the purpose of preventing the two non-resident defendants from removing the case. This was supported by the contention that the proof as offered left no doubt that Deming had made the contract declared on merely as the agent of the two corporations and was therefore not personally bound. In denying the petition to remove, the trial judge directed attention to the fact that the motion made at the close of the plaintiff's proof for a nonsuit in favor of Deming had been denied because the court was of opinion that there was evidence to go to the jury on the question of the liability of that defendant and further observed that the situation in this respect had not been altered by the testimony introduced for the defendants. The cause was submitted to the jury upon instructions which, among other things, left it open to find against less than all of the defendants if the jury believed that the contract had not been made with all. There was a verdict for the plaintiff against all the defendants, and a judgment entered thereon was affirmed by the Supreme Court of the State. 62 Washington, 455. The appellate court, among other things, decided that no

error had been committed in overruling the motions for nonsuit and in denying the petition to remove, and in substance held that the plaintiff had the right to join Deming as a party defendant.

The prosecution of this writ of error is based upon the assumption that a Federal question was involved in the refusal to grant the petition for removal. In view, however, of the well settled and indeed now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous we think it is our duty to grant a motion to dismiss which has been here made. We reach this conclusion because the case was not a removable one when it was called for trial. Not being removable before trial, the plaintiff had the right to have the issues of fact and law raised determined in the state court which had jurisdiction over the cause. This power could not be destroyed by the mere act of the defendants, or one of them, in asking a removal based upon the assumption that if the evidence in the case was properly weighed and the legal principles applicable were correctly applied there would result a condition from which a right to remove would arise. On its face the assertion of such a right involved two propositions, whose unsubstantial character is made manifest by their mere statement: *a.* that the state court had jurisdiction over the cause, but had no right to exercise that jurisdiction; *b.* that a Federal court could endow itself with jurisdiction over a cause to which its authority did not extend by disregarding the pleadings and wrongfully assuming the right to revise the decision of the state court on matters of an absolutely non-federal character which that court had the right to decide. Nor is there force in the suggestion that the right to remove under the circumstances stated finds support in the ruling

in *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, since in that case a separable controversy on the face of the record arose at the opening of the trial consequent on the discontinuance by the plaintiff of his action as against the resident defendant whose joinder had up to that time made the action non-removable. The difference between that case, and the one here presented is apparent and at the time the petition for removal was presented and this writ of error was sued out had been pointed out in decisions of this court. *Whitcomb* v. *Smithson*, 175 U. S. 635; *Alabama Southern Ry.* v. *Thompson*, 200 U. S. 206, 217; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308.

Dismissing the writ of error, as we shall therefore do for the reasons stated, it remains to consider whether we should grant a prayer for damages for delay which has been made. That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable. Does the power to award damages for delay exist where a writ of error is dismissed because of the unsubstantial and frivolous character of the asserted Federal right and the conclusive inference that the writ was prosecuted for mere delay which arises from sustaining such ground for dismissal? is then the question. That the comprehensive text of rule 23, embracing as it does "all cases" where a writ of error shall appear to have been sued out for mere delay, brings this case within its purview is obvious. But as the power which the rule expresses depends upon Rev. Stat., § 1010, we must consider the subject in the light of the statute. The power conferred is to impose damages for delay in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court. . ."

It has been decided that where there was no power on a motion to dismiss to consider whether a case was prosecuted for delay only that a prayer for dismissal on such

ground could not be allowed and damages could not be awarded. *Amory* v. *Amory*, 91 U. S. 356. But the mere statement of the doctrine demonstrates that it rested upon the obvious proposition that a decree would not be made to embrace subjects which the court was not empowered to consider in determining whether the relief asked for should be awarded. This doctrine has no application here since by a line of cases announced subsequent to the decision in *Amory* v. *Amory*, it has come to be settled that on a motion to dismiss it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial either because concluded by previous authority or because of its absolutely frivolous nature, and if it is found to be of such character to allow a motion to dismiss. This being true as the conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous the duty to affirm results.

We have then this situation, the finding that a particular ground—that is, the frivolity of the Federal question—exists indifferently justifies either a judgment of affirmance or an order of dismissal. *Chanute City* v. *Trader*, 132 U. S. 210; *Richardson* v. *Louisville & N. R. Co.*, 169 U. S. 128; *Blythe* v. *Hinckley*, 180 U. S. 333, 338; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336, 345; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308. The want of substantial difference between the two, as well as the rule which should determine the practice to be followed in awarding, in such a case, one or

the other, either affirmance or dismissal, was pointed out in the *Equitable Case*. Thus, the court said (187 U. S. 314):

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, *Richardson* v. *Louisville & N. R. Co.* and *Blythe* v. *Hinckley*, *supra*. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. . . . As this is a case governed by the principles controlling writs of error to state courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, that is, the two questions are therefore absolutely coterminous. Hence,

in reason, the denial of one of the motions necessarily involves the denial of the other, and hence also one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other."

Stating that in such a case the determination whether a judgment of affirmance would be awarded or an order of dismissal be allowed involved nothing whatever of substance, but mere form of statement, as the two were the equivalent one of the other, it was observed that the better practice, where the question was not inherently Federal, was to adopt the form of allowing a motion to dismiss, the court, on the subject of the inherently Federal question, referring to *Swafford* v. *Templeton*, 185 U. S. 487, 493.

The enquiry then narrows itself to this: Does the power to award the damages for delay which the statute confers in cases of affirmance give the authority to exert the power where, in form, there is no judgment of affirmance but only an order of dismissal? To say that the duty to impose the statutory damage in such a case did not exist would require us to hold that things which were one and the same must be held to be different, and that the statute did not extend to and include that which in substance it embraced, because, by adhering blindly to mere form of words, the statute might be treated as not extending to an authority embraced within its spirit and purpose. No more cogent demonstration of the truth of this view could be given than by pointing out that if the proposition were not true it would follow that in no case could this court, without operating injustice, grant a motion to dismiss because of the frivolous and unsubstantial nature of the alleged Federal ground. This would be the case since if greater right would be conferred by affirming on such ground, the duty would arise to follow that practice instead of the practice of dismissing. Indeed, the subject is further aptly illustrated by directing attention to the fact that it is not questioned that the power here obtains

to direct the imposition of the penalty if the result of our conclusion that the Federal ground was frivolous be followed by an affirmance instead of an order of dismissal. Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case. In stating the reasoning which has led us to this conclusion we have not been unmindful of, although we have not reviewed, a line of cases concerning the nature and extent of the power to impose costs in the case of a dismissal for want of jurisdiction. See *Citizens' Bank* v. *Cannon*, 164 U. S. 319, 323, and cases cited. We have not deemed it necessary to do so because nothing in the reasoning of those cases tends to affect the substantial identity which exists between a decree of dismissal and one of affirmance where the ground upon which one is placed equally justifies either form of decree.

In consequence of the conclusion which we have reached as above stated we direct the imposition of a penalty, in addition to interest, of five per cent. on the amount of the judgment recovered below and the taxation of costs as upon an affirmance.

Writ of error dismissed with damages, etc.

FIRST NATIONAL BANK OF PRINCETON, ILLINOIS *v.* LITTLEFIELD, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 572. Submitted November 4, 1912.—Decided December 2, 1912.

The settled rule is that the concurrent action of two courts below upon questions of fact will not be disturbed except in case of manifest error.

In this case appellant being claimant below had the burden of proof, and this court will not reverse the finding of both courts that the burden was not sustained.
193 Fed. Rep. 24, affirmed.

THE facts are stated in the opinion.

Mr. Thorndike Saunders for appellants.

Mr. Daniel P. Hays for appellee.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

Albert O. Brown and others, members of a firm known as A. O. Brown & Company, stock brokers in New York City, were adjudicated bankrupts. The First National Bank of Princeton and four other claimants petitioned to have the receiver in bankruptcy return certain sums of money to which they asserted ownership, because the amounts claimed had been sent to the firm to buy shares of stock for account of the claimants and the stock had never been delivered to them. The special master to whom the matter was referred reported in favor of the claimants. The District Court, however, disapproved the conclusion of the master and rejected the claims. The Circuit Court of Appeals reversed. 175 Fed. Rep. 769. It was held that as the stock bought with the moneys of the claimants and for their account belonged to them they were entitled as owners, the stock having been wrongfully converted by the bankrupts, to take out of the bankrupt estate so much of the avails of their wrongfully converted stock as they might be able to trace into the hands of the receiver. Upon amended pleadings a further hearing was had before the special master, who reported against the claimants because it was found as a matter of fact that there was a failure to trace any of the proceeds of the converted

stock into the hands of the receiver. The report of the master was confirmed by the District Court (189 Fed. Rep. 432, 437), and the action of that court was in all respects affirmed by the Circuit Court of Appeals (193 Fed. Rep. 24). This appeal was then taken, and the claim of the Princeton Bank has been specially presented, under an agreement that the decision as to that claim will govern as to the others.

All the contentions relied upon in various forms simply assert that the master and the two courts erred in their appreciation of the facts. But the burden of proof was upon the claimant to establish its ownership of the fund, a burden which it cannot in reason be said was sustained in view of the concurrent adverse action of the master and the courts below. Indeed as the settled rule is that the concurrent action of two courts upon questions of fact will not be disturbed except in a case of manifest error, a condition which we are of the opinion after an examination of the record does not here obtain, it follows that the judgment below must be and it is

Affirmed.

SELOVER, BATES AND COMPANY *v.* WALSH.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 22. Submitted October 29, 1912.—Decided December 2, 1912.

With the ruling of the state court as to the applicability of a state statute to a particular contract this court has nothing to do. It is concerned only with the question of whether as so applied the law violates the Federal Constitution.

The court may, through action upon, or constraint of, the person within its jurisdiction, affect property in other States.

The obligation of a contract is the law under which it was made, even though it may affect lands in another State; and in an action which

does not affect the land itself but which is strictly personal, the law of the State where the contract is made gives the right and measure of recovery.

A contract made in one State for the sale of land in another can be enforced in the former according to the *lex loci contractu* and not according to the *lex rei sitæ*. *Polson* v. *Stewart*, 167 Massachusetts, 211, approved.

Where the state court has construed a state law as applied to the case at bar, this court will presume that the state court will make the statute effective as so construed in other cases. This court will not anticipate the ruling of the state court.

A state statute providing that the vendor of lands cannot cancel the contract without reasonable written notice with opportunity to the vendee to comply with the terms is within the police power of the State; and so *held* that Chapter 223 of the Laws of 1897 of Minnesota is not unconstitutional under the Fourteenth Amendment as depriving a vendor of his property without due process of law or denying him the equal protection of the law.

The test of equal protection of the law is whether all parties are treated alike in the same situation.

Contentions as to unconstitutionality of a state statute not made in the court below cannot be made in this court.

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the laws of a State. *Western Turf Association* v. *Greenburg*, 204 U. S. 359.

109 Minnesota, 136, affirmed.

THE facts, which involve the construction of a contract made in Minnesota for sale of land situated in Colorado, and the application thereto of a statute of Minnesota, are stated in the opinion.

Mr. Arthur W. Selover for plaintiff in error:

The *lex loci rei sitæ* applies to all matters with reference to the transfer of lands, including contracts for the purchase and sale thereof.

The law of the State in which mortgaged property is situated governs the redemption. *Brine* v. *Insurance Co.*,

96 U. S. 627; Dicey, Conflict of Laws, 573; Story, Conflict of Laws, p. 591; *Tillotson* v. *Prichard*, 60 Vermont, 94, 107; *In re Kellogg*, 113 Fed. Rep. 120; *Bendey* v. *Townsend*, 109 U. S. 665; *Orvis* v. *Powell*, 98 U. S. 176; *Smith* v. *Smith*, 102 U. S. 442; *Mason* v. *N. W. Mutual Life Ins. Co.*, 106 U. S. 163; *Parker* v. *Dacres*, 130 U. S. 43.

Capacity to contract regarding the sale of lands depends on the laws of the State wherein the lands are situate. Rorer on Inter-State Law, 190, 209, and see p. 167.

The courts of one State cannot order the sale of lands in another. *Watkins* v. *Holman*, 16 Pet. 26, 57; *United States* v. *Fox*, 94 U. S. 315, 320.

That state laws have no extra-territorial effect is undoubted. *Brine* v. *Hartford Fire Ins. Co.*, *supra*; *Lyons* v. *McIlvaine*, 24 Iowa, 9.

A statute of redemption affects the right and not the remedy. *Bronson* v. *Kinzie*, 1 How. 311, 314; *Green* v. *Biddle*, 8 Wheat. 75, 84.

The common-law right of termination entered into this contract in its inception and the right of the vendor to foreclose in this matter is just as binding as would have been the right of redemption of the vendee had one been given him by statute in Colorado at that time.

Under the common law parties have the right to contract as they will respecting time being of the essence of such a contract and as to the conditions and circumstances under which said contract shall terminate; and the courts will respect and carry out such stipulations to the letter. *MacKey* v. *Ames*, 31 Minnesota, 103; *Schuman* v. *Mack*, 35 Minnesota, 279; *Dana* v. *St. P. Inv. Co.*, 42 Minnesota, 194; *Pagel* v. *Park*, 50 Minnesota, 186; *Joselyn* v. *Schwend*, 85 Minnesota, 130; *Tinque* v. *Patch*, 93 Minnesota, 437; *Schwab* v. *Baremore*, 95 Minnesota, 295; *Crisman* v. *Miller*, 21 Illinois, 227–235; *Heckord* v. *Sayne*, 34 Illinois, 142; *Apking* v. *Hoffer*, 104 N. W. Rep. (Neb.) 1; *Iowa R. L. Co.* v. *Mickel*, 41 Iowa, 402; *St. Louis Trust Co.* v.

York, 81 Mo. App. 342; *Coughran* v. *Bigelow*, 9 Utah, 200; *Woodruff* v. *Semi Tropic Land & Water Co.*, 87 California, 275; *Oxford* v. *Thomas*, 160 Pa. St. 8; *Gilbert* v. *Union Pacific R. R. Co.*, 112 N. W. Rep. (Neb.); *Murphy* v. *McIntyre*, 116 N. W. Rep. (Mich.) 197.

Any attempt on the part of the State of Minnesota to authorize the foreclosure of such a contract would be, if effective to any degree as against the non-resident vendee, a taking of his property without due process of law and would deny him the equal protection of the laws. *Pennoyer* v. *Neff*, 94 U. S. 714.

It is physically impossible for the vendor in this contract to comply with any of the requirements of the said statute or to obtain any benefit from its provisions. *Edwards* v. *Kearzey*, 96 U. S. 595; *Fletcher* v. *Peck*, 6 Cranch, 87; *Green* v. *Biddle*, 8 Wheat. 1; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Curran* v. *Arkansas*, 15 How. 304; *Freeman* v. *Howe*, 24 How. 450; *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Hawthorne* v. *Calef*, 2 How. 10; *White* v. *Hart*, 13 Wall. 646; *Gunn* v. *Barry*, 15 Wall. 610; *Walker* v. *Whitehead*, 16 Wall. 314.

The state court describes this statute as one authorizing the summary termination of the contract, and a divestiture of the equitable rights of the vendee must be directly complied with. *Hage* v. *Benner*, 111 Minnesota, 305.

Such statute is beyond the power of the State to enact or enforce. *Bronson* v. *Kinzie*, 1 How. 311; *Watts* v. *Waddell*, 6 Pet. 389; *Kendall* v. *United States*, 12 Pet. 524; *Boswell* v. *Otis*, 9 How. 336; *Howes* v. *Hardeman*, 14 How. 334; *Tennessee* v. *Sneed*, 96 U. S. 69; *Allis* v. *Insurance Co.*, 97 U. S. 145; *Orvis* v. *Powell*, 98 U. S. 176; *Schley* v. *Pullman Palace Car Co.*, 120 U. S. 575; *Langdon* v. *Sherwood*, 124 U. S. 74; *Bacon* v. *Northwestern Mutual Ins. Co.*, 131 U. S. 258; *McGahey* v. *Virginia*, 135 U. S. 662–694;

Goldey v. *Morning News*, 156 U. S. 521; *Barwitz* v. *Beverly*, 163 U. S. 127; *DeVaughn* v. *Hutchinson*, 165 U. S. 570; *Duer* v. *Blockman*, 169 U. S. 243, 247; *Caledonia Coal Co.* v. *Baker*, 196 U. S. 444; *Ex parte Young*, 209 U. S. 123; *Fall* v. *Eastin*, 215 U. S. 1–8; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 367; *Benedict* v. *St. Joseph W. Ry. Co.*, 19 Fed. Rep. 176; *Singer Mfg. Co.* v. *McCullock*, 24 Fed. Rep. 669; *Union Mutual Ins. Co.* v. *Union Mills Co.*, 37 Fed. Rep. 292; *Central Trust Co.* v. *Union Ry. Co.*, 65 Fed. Rep. 257; *Southern Ry. Co.* v. *Bouknight*, 70 Fed. Rep. 442, 446; *Deck* v. *Whitman*, 96 Fed. Rep. 873, 884; *Nelson* v. *Potter*, 50 N. J. Law, 324, 326; *Lindley* v. *O'Reilly*, 50 N. J. Law, 636, 643; *Second Ward Bank* v. *Schrank*, 97 Wisconsin, 250, 262; *Griffin* v. *Griffin*, 18 N. J. Eq. 104, 107; *Jackson* v. *Dunlap*, 1 Johns. 114; *Jackson* v. *Parkhurst*, 4 Wend. 369; *Rockwell* v. *Hobby*, 2 Sanford C. R. 9.

Considered from an international point of view, jurisdiction to be rightfully exercised must be founded upon the person being within the territory—for otherwise there can be no sovereignty exercised. Story on Conflict of Laws, 754; Wharton on Conflict of Laws, 64; *Boswell's Lessee* v. *Otis*, 9 How. 336, 348; *United States* v. *Fox*, 94 U. S. 315; *Freeman* v. *Alderson*, 119 U. S. 185; *Arndt* v. *Griggs*, 134 U. S. 316, 320; *Dewey* v. *Des Moines*, 173 U. S. 193, 204; *Overby* v. *Gordon*, 177 U. S. 214, 222; *Old Wayne Ins. Co.* v. *McDonough*, 204 U. S. 8, 21.

The doctrine of *Pennoyer* v. *Neff* is followed and the previous decisions of the Massachusetts court to the contrary overruled. *Elliot* v. *McCormick*, 144 Massachusetts, 10, and see *Cooper* v. *Reynolds*, 10 Wall. 308; *Eastman* v. *Wadleigh*, 67 N. H. 251; *Esterly* v. *Goodwin*, 35 Connecticut, 273, 277.

Strictly speaking the contract was not made in Minnesota, and the holding of the court below that it was is against the great weight of authority. The contract became effective upon its acceptance and signature by the

vendee in North Dakota. *Killeen* v. *Kennedy*, 90 Minnesota, 414; *Stockham* v. *Stockham*, 32 Maryland, 196; *Milliker* v. *Pratt*, 125 Massachusetts, 374; *Bauer* v. *Shaw*, 168 Massachusetts, 198; *Abbott* v. *Shepard*, 48 N. H. 14; *Hass* v. *Myers*, 111 Illinois, 421; *Crandall* v. *Willig*, 166 Illinois, 233; *Patrick* v. *Bowman*, 149 U. S. 411, 424; *Machine Co.* v. *Richardson*, 89 Iowa, 525; *Cooper* v. *Company*, 94 Michigan, 272; *Tolman Co.* v. *Reed*, 115 Michigan, 71; 2 Kent's Comm. 47; 1 Parsons, Contracts, 475; 1 Story, Contracts, 490; Hilliard on Sales, § 20; Benjamin on Sales, § 73; *Bascom* v. *Ediker*, 48 Nebraska, 380; *Gay* v. *Rainey*, 89 Illinois, 221; *Eliason* v. *Henshaw*, 4 Wheat. 225; *McIntyre* v. *Parks*, 3 Metc. (Mass.) 207; *Buchanan* v. *Bank*, 55 Fed. Rep. 223; *Western &c. Co.* v. *Kilderhouse*, 87 N. Y. 430.

The place of the acceptance of a proposition is the place of the contract. Where a written contract, signed by one party is forwarded to be signed by another the place of signature or assent is the place of the contract. Wharton on Conflict of Laws, 886; *Emerson Co.* v. *Proctor*, 97 Maine, 360; *Northampton Insurance Co.* v. *Tuttle*, 40 N. J. Law, 176; *Hill* v. *Chase*, 143 Massachusetts, 129; *Morehouse* v. *Terrill*, 111 Ill. App. 460; *Born* v. *Insurance Co.*, 120 Iowa, 290; *Lawson* v. *Tripp*, 90 Pac. Rep. 500; *Gallaway* v. *Standard Ins. Co.*, 45 W. Va. 237; *Rickard* v. *Taylor*, 122 Fed. Rep. 931; *Newlin* v. *Prevo*, 90 Ill. App. 515; *Central of Georgia Railway* v. *Gortalowiski*, 123 Georgia, 366; *Waldron* v. *Ritchings*, 9 Abb. Pr. (N. S.) 359; *Aultman, Millers Co.* v. *Holder*, 68 Fed. Rep. 467; *Perry* v. *Iron Co.*, 15 R. I. 380; *Cobb* v. *Dunleavi*, 6 S. E. Rep. 384; *Bank* v. *Doedny*, 113 N. W. Rep. 81.

Contract made by telephone by persons in different counties is made where the person is who accepts the offer of the other. *Bank of Yolo* v. *Sperry Flour Co.*, 90 Pac. Rep. (Cal.) 855.

The act of performance, default in which gave the admitted right to terminate the contract, arose not in

Minnesota but in Colorado where alone the taxes were to be paid. There was no breach at the time of any act to be performed by the vendee in Minnesota.

Such statutes are void as depriving plaintiff in error of its liberty of contract without due process of law. *Mathews* v. *People*, 202 Illinois, 389; *Gillespie* v. *People*, 188 Illinois, 176.

With the constitutional right to contract and terminate contracts, the legislature cannot interfere. *Ritchie* v. *People*, 155 Illinois, 98; *Frorer* v. *People*, 141 Illinois, 172; *State* v. *Julow*, 129 Missouri, 163; *Cleveland* v. *Clements Brothers*, 67 Oh. St. 197; *Shaughnessey* v. *American Surety Co.*, 138 California, 543; *State* v. *Robbins*, 71 Oh. St. 273; 290; *Kuhn* v. *Common Council*, 70 Michigan, 534; *Andrews* v. *Beane*, 15 R. I. 451; *Powers* v. *Shephard*, 45 Barb. 524.

The statute here involved denies the right of contracting parties to fix the terms on which their contract shall terminate or to waive notice of termination. This has been held to be an unwarranted interference with the right to contract. *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931.

This court in several important cases has affirmed the same doctrine under the provisions of the Fifth and Fourteenth Amendments. *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

Liberty of contract is subject to reasonable police regulation by the State, but only with respect to a subject-matter over which it has jurisdiction. To prohibit the making of a certain kind of contract respecting the transfer of land in another State, is to deprive the citizen of his liberty of contract.

Such statutes are void as depriving the plaintiff in error of its property without due process of law.

Abolishment of all remedy is objectionable to the Con-

stitution in that it deprives the citizen of his property without due process of law. Black on Const. Prohibitions, §§ 146–171; Sutherland on Stat. Const., 1206; *Butz* v. *Muscatine*, 8 Wall. 575.

Such statutes are void because they deny to the plaintiff in error the equal protection of the laws.

A transfer or a right to transfer immovable property cannot be subject to regulations at the same time by two different and distinct sovereignties. In so far as the State of Minnesota penalizes its resident owner because he has obeyed the law of the State or country wherein the land is situated—the law which he must be subject to—just so far does it exceed its powers and deny to its citizen the equal protection of the laws. *Price* v. *Pennsylvania*, 113 U. S. 218; *Allen* v. *St. Louis Bank*, 120 U. S. 27; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 544; *Massie* v. *Cesna*, 239 Illinois, 352; *Cincinnati S. R. Co.* v. *Snell*, 193 U. S. 30; *Ex parte Hollman*, 60 S. E. Rep. 19, 25; *Ex parte Hawley*, 115 N. W. Rep. 93; *American T. Co.* v. *Superior Court*, 90 Pac. Rep. 15; *In re Van Horne*, 70 Atl. Rep. 986; *Greene* v. *State*, 122 N. W. Rep. 6; *Lovely* v. *M., K. & T. Ry. Co.*, 120 S. W. Rep. 852; *Hoxie* v. *N. Y., N. H. & H. R. Co.*, 73 Atl. Rep. 754; *Employers' Liability Cases*, 207 U. S. 463, 501; *Seaboard Air Line* v. *Railway Com'rs*, 155 Fed. Rep. 792; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994; *Phipps* v. *Wisconsin Central Ry. Co.*, 133 Wisconsin, 153.

By this decision the court below refused to give full faith and credit to the acts and records of Colorado. *Chicago &c. Railway Co.* v. *Wiggins Ferry Co.*, 119 U. S. 622; *Northern Mutual Bldg. Ass'n* v. *Brahan*, 193 U. S. 647; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 72.

Such legislation and the holding therein of the court below make and enforce a law which abridges the privileges and immunities of plaintiff in error as a citizen of

the United States. *Ex parte Virginia*, 100 U. S. 347; *Chicago &c. Railway Co.* v. *Chicago*, 166 U. S. 234; *Missouri* v. *Dockery*, 191 U. S. 170; *Huntington* v. *New York*, 118 Fed. Rep. 686.

Mr. A. B. Choate and *Mr. George W. Buffington* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to the Supreme Court of Minnesota to review a judgment of that court awarding damages to defendant in error for a breach by plaintiff in error of an executory contract for the sale of land situated in the State of Colorado.

The contract was made by one Bates for plaintiff in error at the office of the latter, in the city of Minneapolis, he being one of its officers, with P. D. Walsh, the husband of defendant in error. Walsh, however, actually signed the contract at his residence in South Dakota. He subsequently assigned his interest to her as Bates did to plaintiff in error.

Plaintiff in error, asserting that Walsh had made default of the terms of the contract, canceled it and subsequently sold the land to other parties. This action was then brought by defendant in error, resulting in a judgment for her which was affirmed by the Supreme Court. 109 Minnesota, 136.

By the contract Bates, the assignor of plaintiff in error, covenanted to convey the land to Walsh, the assignor of defendant in error, reserving certain mining rights therein. Payments were to be made in installments at the office of plaintiff in error in Minneapolis, punctually, and it was stipulated "that time and punctuality" were "material and essential ingredients" of the contract. It was covenanted that in case of failure to make the payments

"punctually and upon the strict terms and times" limited, and upon default thereof or in the strict and literal performance of any other covenant, the contract, at the option of the party of the first part (Bates) should become utterly null and void and the rights of the party of the second part (Walsh) should "at the option of the party of the first part utterly cease and determine" as if "the contract had never been made." There was forfeiture of the sums paid and a reversion of all rights conveyed, including the right to take immediate possession of the land "without process of law," and it was covenanted that no court should "relieve the party of the second part upon failure to comply strictly and literally" with the contract.

The default of Walsh consisted in the failure to pay taxes, and plaintiff in error elected to terminate the contract, and gave notice of such election to him in writing in the State of North Dakota. Against the effect of such default and notice defendant in error opposed Chapter 223, Laws of Minnesota (Laws of 1897, p. 431), which provides that a vendor in a contract for the sale of land shall have no right to cancel, terminate or declare a forfeiture of the contract except upon thirty days' written notice to the vendee and that the latter shall have thirty days after service of such notice in which to perform the conditions or comply with the provisions upon which default shall have occurred.

The trial court and the Supreme Court held the statute applicable and judgment went, as we have said, for defendant in error. This ruling is attacked on the ground that as so applied the statute offends against the Fourteenth Amendment of the Constitution of the United States in that it deprives plaintiff in error of its property without due process of law and of the equal protection of the laws.

With the ruling of the court as to the applicability of the statute to the contract we have nothing to do. We are

only concerned with the contention that, as so applied, it violates the Fourteenth Amendment. Of this the Supreme Court said (p. 138):

"There can be no serious question as to the constitutionality of the statute. It in effect prescribes a period of redemption in contracts of this character, and was within the power and authority of the legislature. Defendants' principal contention on this branch of the case is not so much that the statute is unconstitutional as that it should not be construed to apply to contracts made in Minnesota for the sale of land in another state. There is force in this contention; but within the rule of the *Finnes Case*, which a majority of the court do not feel disposed to reconsider, the action does not involve the title to the land, is purely personal, and the rights of the parties are controlled by the laws of this State. Under the decision in that case, defendants had no right arbitrarily to declare the contract at an end and refuse to perform it, and are liable for such damages as their refusal caused plaintiff. Following the *Finnes Case*, we have no alternative but to affirm the action of the court below."

This excerpt clearly presents the ground of the court's decision, and we may put in contrast to it the contention of plaintiff in error. Its contention is that the contract itself provided for the manner of its termination and made exact punctuality the essence of its obligation, and that the statute of the State, as it exempts from such obligation, deprives plaintiff in error of its property without due process of law. The argument to support the contention is somewhat confused, as it mingles with the right of contract simply a consideration of the State's jurisdiction over the land which was the subject of the contract. As to the contract simply we have no doubt of the State's power over it, and the law of the State, therefore, constituted part of it. It is elementary that the obligation of a contract is the law under which it was made, and we are

not disposed to expend much time to show that the Minnesota statute was a valid exercise of the police power of the State. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549; *Broadnax* v. *Missouri*, *Id.* 285. Whether it had extra-territorial effect is another question. The contention is that the statute as applied affected the transfer of land situated in another State and outside of, therefore, the jurisdiction of the State of Minnesota. In other words, it is contended that the law of Colorado, the situs of the property, is the law of the contract. The principle is asserted in many ways and with an affluent citation of cases. The principle cannot be contested, but plaintiff in error pushes it too far. Courts in many ways through action upon or constraint of the person affect property in other States (*Fall* v. *Eastin*, 215 U. S. 1), and in the case at bar the action is strictly personal. It in no way affects the land or seeks any remedy against it. The land had been conveyed to another by plaintiff in error and it was secure in the possession of the purchaser. Redress was sought in a Minnesota court for the violation of a Minnesota contract, and, being such, the law of Minnesota gave the right and measure of recovery.

In *Polson* v. *Stewart*, 167 Massachusetts, 211, a contract made in North Carolina between a husband and wife, who were domiciled there, by which he covenanted to surrender, convey and transfer all of his rights to lands owned by her in Massachusetts, was declared to be a North Carolina contract and enforceable in Massachusetts notwithstanding that under the law of the latter State husband and wife were incapable of contracting with each other. To the objection that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts, it was answered (p. 214), "Obviously this is not true. It is true that the laws of other States cannot render valid conveyances to property within our borders which our laws say are void, for the

plain reason that we have exclusive power over the *res* . . . . But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants, not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract." Precedents against the view were noted and contrasted with those supporting it.

The case at bar is certainly within the principle expressed in *Polson* v. *Stewart*. The Minnesota Supreme Court followed the prior decision in *Finnes* v. *Selover, Bates & Co.*, 102 Minnesota, 334, in which it said (p. 337) that upon repudiation of a contract by the seller of land two courses were open to the purchaser: "He might stand by the contract and seek to recover the land, or he could declare upon a breach of the contract and recover the amount of his damages." If he elected the former, it was further said, the courts of Colorado alone could give him relief; if he sought redress in damages the courts of Minnesota were open to him. And this, it was observed, was in accordance with the principle that the law of the situs governs as to the land, and the law of the contract as to the rights of the parties in the contract.

Plaintiff in error bases a contention upon the difficulty of complying with the provisions of the statute with regard to giving notice. Written notice is, as we have seen, necessary to be given of any default, and the time when the cancellation of the contract shall take effect, which must not be less than thirty days after the service; and it is provided that the notice must be served in the manner provided for service of summons in the District Court if the vendee resides in the county where the real estate covered by the contract is situated. If the vendee is not

within the county where the real estate is situated, then notice must be served by publication in a weekly newspaper within the county, or, if there is none in the county, then in a newspaper published at the capital of the State. And it is provided that the vendee shall have thirty days after service to perform the conditions or comply with the provisions. The contention is that these provisions cannot be complied with either in Minnesota or Colorado and that plaintiff in error is brought to the dilemma of not being able to cancel the contract whatever be the default.

The dilemma was not presented to the Supreme Court of the State for resolution, as plaintiff in error had made no attempt to comply with the statute in any way. As that court held the statute applicable to contracts such as that under review, it will, no doubt, in a proper case, so construe the statute as to make it effective. We are not called upon to anticipate its ruling.

It is manifest from these views that plaintiff in error was not by the enforcement of the Minnesota statute deprived of its property without due process of law.

It is further contended that the Minnesota statute denies plaintiff in error the equal protection of the laws and is therefore void. In specification of the way in which this is done plaintiff in error says: "In so far as the State of Minnesota penalizes its resident owner because he has obeyed the laws of the State or country wherein the land is situated—the law which he must be subject to—just so far does it exceed its powers and deny to its citizens the equal protection of the laws." This manifestly is but another way of presenting the argument, which we have answered, that the law of Colorado controls the contract and not the law of Minnesota. Discrimination is not made out by saying that resident owners of Minnesota land are given a right to foreclose their contracts and that residents of Minnesota owning land in other States are not given the same right, even if this were true. The plaintiff

in error is not treated differently from any other seller of land in his situation. This is the test of the application of the equal protection clause of the Constitution of the United States.

Plaintiff in error further charges that the Supreme Court of the State refused to give full faith and credit to the acts and records of Colorado. The contention was not made in the court below and cannot be made here. The same comment is applicable to the contention that privileges and immunities of plaintiff in error as a citizen of the United States are abridged. We may say of the contentions that they are but a repetition of the view that the law of Colorado and not that of Minnesota governs the contract. And we may say further it is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359.

Judgment affirmed.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER dissent.

TAYLOR *v.* COLUMBIAN UNIVERSITY (NOW KNOWN IN LAW AS GEORGE WASHINGTON UNIVERSITY).

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 41. Argued November 6, 1912.—Decided December 2, 1912.

A devise and bequest to a university to establish an endowment fund for free education of young men for preparation for entrance to the United States Naval Academy or to fit them to become mates or masters in the Merchant Marine Service of the United States, *held*

in this case to create a charitable trust that is capable of execution and one which is not void as too indefinite for execution.

Where testator names one institution to carry out a trust and names another as alternate in case the former shall not be able to perform, the court will not declare the trust impossible of execution on account of the failure of the first-named institution to carry it out until after the second named has also tried and failed.

Conclusions as to facts reached by two lower courts will not be disturbed by this court unless manifestly erroneous.

In establishing an educational endowment fund the words "Merchant Marine Service of the United States" have a definite meaning sufficient to sustain the trust.

25 App. D. C. 124, affirmed.

THE facts, which involve the construction and validity of a testamentary trust, are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. J. K. M. Norton* was on the brief, for appellants:

The devise does not create a charitable trust.

Admiral Powell made no gift for education. He made a gift for the Navy of the United States. It must be apparent that his purpose was not to aid any university, or any of its branches, nor to aid education; his sole purpose and object, as he expressly declared, was—"to make some contribution to the Navy of the United States."

The carrying out of the bequest in the way designated, cannot, in any way, help the Navy, which was the sole object of his bounty.

The Court of Appeals construed the bequest as a sort of educational trust, and so sustained it as a charity, citing as authority *Vidal* v. *Girard*, 2 How. 127; *Ould* v. *Washington Hospital*, 95 U. S. 303; *Spear* v. *Whitney*, 24 App. D. C. 187.

In each of these cases, however, the intent was to create a charity, and the thing created was a charity. The Powell bequest was nothing like these cases.

The court fell into the error of supposing that Admiral Powell intended to aid in education of some sort. If this

had been his purpose he would have created an endowment, the income therefrom to be used to give such free instruction as he might designate.

The bequest does not come under the broadest definition of charitable bequests. Words and Phrases, 1075.

If it does not appear from the instrument that the donor intended a general public charity, it will not be carried out at all, if, by reason of its uncertainty or otherwise, it cannot be so carried out as to accomplish the object specified by the donor. *Kain* v. *Gibboney*, 101 U. S. 362; *Stratton* v. *Physio-Med. College*, 149 Massachusetts, 505; and see Desty's note to this case, 5 L. R. A. 35; *People* v. *Powers*, 147 N. Y. 104.

In England, under the law of charitable uses, bequests for charity have been sustained; whilst benevolent gifts, without a designated beneficiary, have been held too indefinite, and therefore void. See *Norris* v. *Thompson*, 19 N. J. Eq. 307; Perry on Trusts, § 709; *In re Randell*, 38 Ch. D. 213 (Eng., 1888); *Re Prison Charities*, 16 Eq. 129 (Eng., 1873); Story on Eq. Jur., § 1182.

The devise in question, made for the definite purpose of helping the Navy or paying a debt to the marine profession, can in no way accomplish the sole purpose of the gift, and so must fail.

If the devise be held to be a charitable trust, it is yet too uncertain and indefinite to be carried out. Under the devise it is uncertain what young men are to partake of the benefit; no method nor plan for the selection of the beneficiaries is prescribed or provided.

There has never been a bequest that more absolutely or perfectly fulfilled all the conditions of a void bequest. *Norcross* v. *Murphy*, 44 N. J. Eq. 522; *Tilden* v. *Green*, 130 N. Y. 29.

If the charity is general and indefinite and no plan or scheme is prescribed, and no discretion is given to select the beneficiaries, it does not admit of judicial administra-

tion. The will should prescribe some mode of selection, or give some person discretionary power to select. *Fairfield* v. *Lawson*, 50 Connecticut, 501, 513; *Beardsley* v. *Bridgeport*, 53 Connecticut, 489; *Hughes* v. *Daly*, 49 Connecticut, 34; *White* v. *Fisk*, 22 Connecticut, 30, 53; *Grimes* v. *Harmon*, 35 Indiana, 198; *Church* v. *Mott*, 7 Paige, 77; *Goodell* v. *Union Asso.*, 29 N. J. Eq. 32.

In South Carolina the English doctrine of charities has been generally accepted, but there, as in England and in the other States of this country, where a particular charity has not been specified, but the charity is of a general nature, without the appointment of trustees to select the beneficiaries, the courts will not devise a scheme for carrying it out. *Atty. General* v. *Jolly*, 1 Rich. Eq. 99; *Gibson* v. *McCall*, 1 Rich. 174.

In Tennessee charitable bequests are upheld quite broadly. *Green* v. *Allen*, 5 Humph. 204; *State* v. *Smith*, 16 Lea, 662; *State* v. *Ellison*, 4 Baxt. 99; 2 Cold. 80; 1 Swan. 360; 7 Heisk. 694.

But the Supreme Court of that State has held that the beneficiary of the trust, or the class that is to take, must be designated by the testator, so that some one or class will have the right to compel the enforcement. *Johnson* v. *Johnson*, 92 Tennessee, 571.

In Maryland the principle is clearly recognized and firmly established, that a trust, to be upheld, must be of such a nature that the *cestuis que trust* are defined and are capable of enforcing its execution by proceedings in a court of chancery. *Maught, Exr.*, v. *Getzendanner*, 65 Maryland, 529, 533; *S. C.*, 72 Maryland, 67; *M. E. Church* v. *Smith*, 56 Maryland, 362; *Dashiell* v. *Atty. Genl.*, 5 Harris and Johnson, 392, and 6 H. and J. 1; *Yingling* v. *Miller*, 77 Maryland, 104; *Rizer* v. *Perry*, 58 Maryland, 112; *Needles* v. *Martin*, 33 Maryland, 609; *Wheeler* v. *Smith*, 9 How. 55; *Trinity M. E. Church* v. *Baker*, 91 Maryland, 539 (decided June, 1900); and see

Pratt v. *Sheppard*, 88 Maryland, 610, which reviews all the Maryland decisions above cited, and *Gambell* v. *Trippe*, 75 Maryland, 252; *Barnum* v. *Mayor of Baltimore*, 62 Maryland, 275, 292.

The Maryland decisions have been followed by the courts in the District of Columbia, and they expound the principles as held by our courts in all cases like the one at bar. *Long* v. *Gloyd*, 25 Wash. Law Rep. 50; *Coltman* v. *Moore*, 1 MacArthur, 197. The trustee has not been able to carry out the trust so as to accomplish the purpose of the testator.

Mr. Walter C. Clephane for appellees.

Mr. Justice McKenna delivered the opinion of the court.

Suit by appellants as heirs of Levin M. Powell to declare void a trust created by his will and to recover certain real estate held by the George Washington University, the legal successor of the Columbian University.

Levin M. Powell was, when he made his will, an admiral in the United States Navy on the retired list. The clause which creates the trust is as follows:

"Item: Fifth, it being my wish and desire to make some contribution to the Navy of the United States, of which I have been for so many years, I hope, a worthy member, and so in a measure to pay off the debt I feel I owe the honorable profession I have pursued through a long lifetime, and to that end to establish in the Columbian University in the District of Columbia, in a manner most conducive for that purpose, a means for the education of such young men as may be willing to profit therefrom in the branches of education best fitted to prepare them for officers of the line in the Navy of the United States, or for the places of mates or captains in the merchant marine

service of the United States. I do hereby give, devise, and bequeath to the said Columbian University and its successors all those certain pieces or parcels of ground situate and lying in said city of Washington, . . . in trust for the purposes following, and for no other purpose whatever—that is, in trust to create an endowment to be known as the Admiral Powell endowment, and with that view to take the said property, and the same to rent from year to year or to lease for a term of years as to the trustees and overseers of said university shall seem best; and the rents, issues, and profits arising therefrom, after first paying out of the same the taxes, insurance, repairs, and other expenses, to devote as far as the same will go, under such regulations as to the said trustees and overseers may seem best, to the free education of such young men as may desire to take advantage of the said endowment by way of their preparation for entrance into the Naval Academy at Annapolis, Maryland, or such as may fit them to become mates or masters in the merchant marine service of the United States, such preparation to be confined in the case of each young man so embracing the advantages of the said endowment to one year, and to include principally the studies following,—that is to say, arithmetic, geometry, trigonometry, and astronomy, with the use of astronomical instruments, the construction of charts, and the application of this knowledge to hydrographical survey by latitude and longitude, and if possible such study as will give to such young men a knowledge of scientific voyages of discovery, and other matters relating to war and commerce on the high seas; and it is further my desire that this endowment shall, if possible, embrace in its benefits such apprentices as, having filled their time in the great steam manufactory establishments of the country, may apply for appointment from civil life in the steam engineer department of the United States Navy, to such I would like to have a year's

education afforded under such regulations as the president and faculty of the university may think proper. And should it at any time for any reason be impossible to carry into effect the trusts, provisions, and conditions having relation to and herein imposed upon this bequest by me made for the creation of the endowment described on the part of the said Columbian University, or should it be made manifest at any time that the said trust is not being administered in accordance with my wishes and desires, and in conformity with the conditions specified, then and in such case it is my will and desire that the said endowment shall be placed in other hands, and to that end, and upon the happening of the contingency mentioned, I do hereby give, devise and bequeath the said property to the Johns Hopkins University of Baltimore, in the State of Maryland, and its successors, to be taken and held by the said university or the officers thereof proper for that purpose, upon the trusts and for the purposes hereinbefore particularly set forth in the bequest of said property to the Columbian University, in such manner that the purposes of the said endowment as by me indicated may be fully carried into effect."

The bill alleges that the Columbian University, supposing it had the right to execute the trust, took possession of the property and has let it to various tenants, and for more than sixteen years has issued a catalogue publishing its classes, the names of all of its students, instructors and officers, and the many and various schools of education it maintains, and that the catalogue is widely circulated throughout the United States. The University has, it is alleged, for a like period advertised "The Powell Scholarship," and notwithstanding the wide circulation of the advertisement the University has been unable to execute the trust.

It is alleged that the devise is so indefinite and the trust intended to be created so uncertain of its objects and sub-

jects that it is impossible of execution by the Columbian University, or by the Johns Hopkins University, and has in no wise been executed by either of them; and that therefore the trust is wholly void and of no effect. The collection of the rents and profits by the Columbian University is alleged. It was prayed that the trust be declared void and that the Columbian University be required to account for the rents and profits collected by it.

A demurrer to the bill was overruled, which ruling was sustained by the Court of Appeals. 25 App. D. C. 124.

The Court of Appeals held that the devise created a special charitable trust and that it was not void for uncertainty or incapacity of execution apparent upon its face. The court, however, held that the nineteenth paragraph of the bill, which alleged that the impossibility of the execution of the trust had been demonstrated, stated a cause of action and remanded the case for further proceedings. Upon the return of the case to the Supreme Court the University answered, by which it traversed the allegations of the bill and alleged in effect that it undertook the trust and has ever since efficiently executed it. It further alleged that its co-defendant, the Johns Hopkins University, is able, ready and willing to accept and administer the trust at any time if for any reason it should be impossible for it, the Columbian University, to administer the same, or "should fail to carry out the trust in that regard reposed in it."

Testimony was taken, and the trial court found from the facts proved the following:

"First. From the testimony adduced by plaintiffs upon this point, it appears that beginning with the scholastic year 1885–6 (the will of Powell was probated in 1885) the defendant Columbian University published in its annual catalogues that under the terms of the Admiral Powell Endowment free scholarships would be given to a limited

number of pupils who were preparing for admission to the United States Naval Academy at Annapolis. This notice was in some issues of the catalogue more explicit, giving in greater detail the terms of the trust, and in other issues courses of study were given from which the special course contemplated by the terms of the trust might be selected. It further appears from the records of the University that beginning with the scholastic year 1891–2 twenty-four young men actually took a course of study under the Powell Scholarships, in some cases the same man being permitted to pursue the course for more than one year. Of this number at least two entered the Naval Academy. I find nothing in the evidence showing the net income derived by the University from the trust property, but there is nothing to show that the full net income thereof was not applied to the administration of the trust. I am of the opinion that the evidence adduced is not sufficient to demonstrate the 'incapacity' of the execution of the trust."

Second. Granting that the testimony was sufficient to demonstrate the inability of the Columbian University to execute the trust, it did not appear that the Johns Hopkins University might not be able to do so, and that until it "has tried and failed the court would certainly not be justified in frustrating the intention of the testator by bestowing the property upon" the plaintiffs, "related so remotely to him."

The Court of Appeals practically affirmed these conclusions. The court said that while the testimony did not show that the expectations of the testator have been fully answered, and that it had failed "to show that the entire net proceeds of the trust property have been devoted exclusively to the purposes of the trust, and none other, it was sufficient to show that the trust can be executed, as well as that, in some measure, it is being executed." The court said further that it was unimportant to con-

sider defects of execution of the trust by the Columbian University as that possibility was contemplated by the testator and the Johns Hopkins University appointed as an alternate trustee, and as its ability to execute the trust was asserted and not denied "it must be taken as true." These conclusions, so far as they depend upon the testimony, not being manifestly erroneous we must accept, being the decisions of two courts.

The legal proposition, however, which determined the ruling upon the demurrer and the first decision of the Court of Appeals is open for consideration. That court, as we have seen, decided that the will created a special charitable trust and that the trust was not void for uncertainty or incapacity of execution apparent upon its face. These propositions are contested. It is contended, first, that the "object of the testator must be clearly charitable; and, second, the thing he directs to be done must, in its execution, accomplish the charitable object, in some degree at least." It is argued that these conditions are not fulfilled by the devise because, it is said, "the testator had no idea of assisting either of the universities named, or of assisting any one merely to get an education," and, further, that "his sole purpose, as he himself stated, was 'to make some contribution to the Navy of the United States.'"

The devise, we think, satisfies the tests. The object of the testator was not "to make some contribution to the Navy of the United States." Such contribution was but an incidental effect, or rather, the mere inducement to the testator's benefaction. The testator's special object was, so far as his property would accomplish it, to give to young men not having the pecuniary ability to prepare themselves the opportunity to do so. Preparatory training was necessary; he made it available, to the extent of his means, to young men who otherwise could not bear the expense. And he knew the conditions of appointment,

in whom it rested and the contingencies upon which it depended. If the field of candidacy was limited, he knew that he was helping some to aspire and qualify to succeed. The knowledge and help were definite. He certainly could not designate the individuals. That could be done, and necessarily was left to be done, by his trustees, one or the other of them. The purpose of the testator has not been disappointed. In other words, the charitable object has been accomplished, "in some degree at least"—the test which appellants apply. The finding is that at least two out of twenty-four of those who availed themselves of the scholarships instituted by the Columbian University entered the Naval Academy. We can suppose a better result from a better administration of the trust.

The testator had in view another career for young men besides the Navy which could be attained by the same means, that is, "the places of mates or captains in the Merchant Marine Service of the United States." But it is said that "there is no such thing" as the Merchant Marine Service "known to the law" and that "therefore the meaning of the testator in this behalf is left open to ascertainment outside of the testator's language and the provision of the will." The criticism is too exact. The Merchant Marine was and is a very definite and substantial thing and had unmistakable definition in general, if not in legal, nomenclature. The meaning of a testator is not required to be found in law lexicons; the usages of popular speech may furnish a guide to it. Besides, the words "Merchant Marine" receive certain meaning from their context, and it is easy to put one's self in the place of the sailor testator and appreciate his impulse and purpose. His relatives were remote, his property not large, and he had been an officer in the United States Navy. He desired to assist others to become also officers in that service or in a cognate service. He knew the equipment necessary and he prescribed it. He chose proper educa-

tional instruments to confer the equipment and to select and qualify the candidates for the designated services. The purpose of the testator was worthy, and there is nothing in reason or authority which requires us to pronounce it legally insufficient.

Decree affirmed.

EUBANK *v.* CITY OF RICHMOND.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 48. Argued November 12, 13, 1912.—Decided December 2, 1912.

While the police power of the State extends not only to regulations promoting public health, morals and safety but also to those promoting public convenience and general prosperity, it has its limits and must stop when it encounters the prohibitions of the Federal Constitution.

A clash between the police power of the State and constitutional limitations will not be lightly inferred, but the exact point of contact cannot be determined by any general formula in advance. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349.

Governmental powers must be flexible and adaptive.

The party assailing the constitutionality of a state police statute must clearly show that it offends constitutional guaranties in order to justify the court in declaring it invalid.

A municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public streets and across private property on the request of less than all of the owners of the property affected is not a valid exercise of police power, nor does it serve the public safety, convenience or welfare.

Such an ordinance takes private property, not for public welfare but for convenience of other owners of property, and deprives the person whose property is taken of his property without due process of law and is unconstitutional under the Fourteenth Amendment.

The ordinance of the city of Richmond based on Chapter 349 of the Laws of Virginia of 1908, requiring the municipal authorities to establish building lines in any block on request of the owners of two-thirds of the property is unconstitutional as an attempt to deprive non-assenting owners of their property without due process of law.

110 Virginia, 749, reversed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of an ordinance of the city of Richmond, Virginia, fixing a building line, are stated in the opinion.

Mr. S. S. P. Patteson for plaintiff in error.

Mr. H. R. Pollard for defendant in error:

Whether or not the power granted by the legislature to cities and towns to establish building lines was lawfully exercised by the council of the city of Richmond, is not open for consideration in this court. *Gundling* v. *Chicago*, 177 U. S. 188; *Williams* v. *Arkansas*, 217 U. S. 79, 88; *Wilson* v. *Eureka City*, 173 U. S. 32, 35.

The Virginia act of 1908, authorizing regulations concerning the building of houses, and, in their discretion, in particular districts or along particular streets, to prescribe and establish building lines or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, is constitutional and valid. *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592; McQuillin on Municipal Ordinances, § 32; 29 Cyc. 859; *Bacon* v. *Walker*, 204 U. S. 311; Dillon on Municipal Corp. § 696; *People* v. *D'Oench*, 111 N. Y. 359; *Welch* v. *Swasey*, 193 Massachusetts, 364; *S. C.*, aff'd 214 U. S. 91; 2 Blackstone's Commentaries, p. 18; *Rochester* v. *West*, 164 N. Y. 510; *State* v. *Hurley*, 73 Connecticut, 536; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355. See article of Professor Seligman in 25 Pol. Sci. Quarterly, 217.

This court, in a larger sense than any other court of the land, has taken judicial cognizance of the everyday facts of modern complex, social and industrial life, and has responded thereto with less apparent reluctance than the courts of last resort of most of the States.

Prima facie every act of a legally constituted legislative body is constitutional, and the person who assails an act on that account, must clearly establish his contention. *Sinking Fund Cases*, 99 U. S. 700, 718; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684.

The rule of the construction of a legislative act which is apparently in restraint of private rights, must not be confounded with the rule which governs in the determination of the question of the constitutionality of a statute. *Bostock* v. *Sams*, 95 Maryland, 400, does not sustain the contention that the presumption should be against the constitutionality of this legislative act.

There is no question concerning the proper construction of the statute, but only whether the statute, not the ordinance, is constitutional, for the ordinance in this court, as hereinbefore shown, must stand or fall with the statute, it having been enacted in pursuance of express authority conferred by the statute. Dillon on Municipal Corp., § 600; *State* v. *Clarke*, 54 Missouri, 17, 36; *Dist. of Col.* v. *Waggaman*, 4 Mackey (D. C.), 328.

Concerning a similar delegation of power see *Danville* v. *Hatcher*, 101 Virginia, 532; *Soon Hing* v. *Crowley*, 113 U. S. 710; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 102; *Strasburger* v. *Commissioners*, 5 Mackey (D. C.), 389.

While neither a state nor a municipal statute enacted to accomplish purposes purely esthetic, which embarrasses property rights, can be sustained as constitutional, Tiedeman, State and Federal Control, p. 755, there is nothing in the record as hereinbefore set out to sustain the contention that the General Assembly of Virginia enacted the statute for esthetic considerations only. *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

As above pointed out the presumption is in favor of the constitutionality of the act. The failure of the statute to make provision for compensation to the lot owner on account of depriving him of the right to occupy his entire

lot with buildings does not invalidate the act, and such a contention is without merit. *Watertown* v. *Mayo*, 109 Massachusetts, 315, 318.

In order to justify the rejection of the statute as unconstitutional it must be wholly, not partially, for esthetic purposes. *Varney & Green* v. *Williams*, 155 California, 318; *S. C.*, 23 L. R. A. (N. S.) (decided in 1910).

The legislature may limit the height of buildings in a section of the city which is devoted to fine buildings and works of art, for the purpose of protecting such buildings and works of art from the ravages of fire. *Cockran* v. *Preston*, 108 Maryland, 220.

While the State cannot compel the surrender of private rights in property for purely esthetic purposes, still, if the primary and substantive purposes of the legislature are such as to justify the act, considerations of taste and beauty may enter in as auxiliary. *Haller Sign Works* v. *Physical Culture School*, 249 Illinois, 436.

MR. JUSTICE MCKENNA delivered the opinion of the court.

In error to review a judgment of the Hustings Court of the city of Richmond affirming a judgment of the Police Court of the city imposing a fine of $25.00 on plaintiff in error for alleged violation of an ordinance of the city fixing a building line. The judgment was affirmed by the Supreme Court of the State. 110 Virginia, 749.

Plaintiff in error attacks the validity of the ordinance and the statute under which it was enacted on the ground that they infringe the Constitution of the United States in that they deprive plaintiff in error of his property without due process of law and deny him the equal protection of the laws.

The statute authorized the councils of cities and towns, among other things, "to make regulations concerning the

building of houses in the city or town, and in their discretion, . . . in particular districts, or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, and to regulate the height of buildings." Acts of 1908, p. 623, 4.

By virtue of this act the city council passed the following ordinance: "That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line. . . . And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line." A fine of not less than twenty-five nor more than five hundred dollars is prescribed for a violation of the ordinance.

The facts are as follows: Plaintiff in error is the owner of a lot thirty-three feet wide on the south side of Grace street between Twenty-eighth and Twenty-ninth streets. He applied for and received a permit on the nineteenth of December, 1908, to build a detached brick building to be used for a dwelling, according to certain plans and specifications which had been approved by the building inspector, dimensions of the building to be 26x59x28 feet high.

On the ninth of January, 1909, the street committee being in session, two-thirds of the property owners on the side of the square where plaintiff in error's lot is situated, petitioned for the establishment of a building line, and in accordance with the petition a resolution was passed establishing a building line on the line of a majority

of the houses then erected and the building inspector ordered to be notified. This was done, and the plaintiff in error given notice that the line established was "about fourteen (14) feet from the true line of the street and on a line with the majority of the houses." He was notified further that all portions of his house "including Octagon Bay, must be set back to conform to" that line. Plaintiff in error appealed to the Board of Public Safety, which sustained the building inspector.

At the time the ordinance was passed the material for the construction of the house had been assembled, but no actual construction work had been done. The building conformed to the line, with the exception of the octagon bay window referred to above, which projected about three feet over the line.

The Supreme Court of the State sustained the statute, saying (p. 752) that it was neither "unreasonable nor unusual" and that the court was "justified in concluding that it was passed by the legislature in good faith, and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects." The court further said that the validity of such legislation is generally recognized and upheld as an exercise of the police power.

Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561. And further, "It is the most essential of powers, at times the most insistent, and

always one of the least limitable of the powers of government." *District of Columbia* v. *Brooke*, 214 U. S. 138, 149. But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. *Noble State Bank* v. *Haskell*, 219 U. S. 104. The point where particular interests or principles balance "cannot be determined by any general formula in advance." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355.

But in all the cases there is the constant admonition both in their rule and examples that when a statute is assailed as offending against the higher guaranties of the Constitution it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates

no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. *One* person having a two-thirds ownership of a block may have that power against a *number* having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

The case requires no further comment. We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases

which are cited are not apposite to the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

BURNET *v.* DESMORNES Y ALVAREZ.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 11. Submitted October 30, 1912.—Decided December 2, 1912.

Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense.

The judgment of a court that a right is established cannot be impeached collaterally by proof that the judgment was wrong.

The provisions of Article 137 of the Civil Code of Porto Rico of 1889 and of § 199 of the act of March 1, 1902, of Porto Rico, requiring actions to claim filiation to be commenced within prescribed periods, do not deprive the court of jurisdiction in case the action is not brought until after the prescribed period. It is a defense that must be pleaded.

This court will be slow to control the discretion of the Supreme Court of Porto Rico as to a matter wholly within its power—such as sending a case back to the lower court for further opportunity to cross-examine.

13 Porto Rico, 18, affirmed.

THE facts are stated in the opinion.

Mr. Willis Sweet for appellant.

No appearance for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a proceeding by the appellees as illegitimate children of Adolfo Desmornes, deceased, to be adjudged his recognized children. The appellant answered that he was the nephew and heir of Desmornes and denied that the appellees were his children or ever were recognized as such. The District Court held that the action had prescribed under the limitations imposed upon actions of this class by the Civil Codes of 1889 and 1902. This decision was reversed by the Supreme Court on the ground that the bar to the action had not been pleaded, and a decree was entered for the appellees upon a consideration of the evidence taken below.

The case was argued in this court on behalf of the appellants only, and we shall content ourselves with discussing the argument made by them. By the Civil Code of 1889, Art. 137, actions of this kind 'can be instituted only during the life of the presumed parents,' with certain exceptions. It appears by the complaint that Desmornes died on November 2, 1905, before this suit was brought. By the statute of Porto Rico approved March 1, 1902, § 199 (Rev. Stat. and Codes, 1902, p. 821), under which the appellant says that the appellees proceed, 'An action to claim filiation may be filed at any time within two years after the child shall become of age,' &c. It appeared in evidence that the appellees became of age more than two years before this action was filed. It is urged that the words of both statutes are jurisdictional and constitute a condition precedent. It is said further that the Supreme Court of Porto Rico in later decisions has shown an inclination to recede from the doctrine of the present one; but as this case has not been overruled in terms we shall do no more than indicate why we think the decision right.

Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defence. When a court has general jurisdiction to try the question whether an alleged right exists the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power. Its judgment that the right is established cannot be impeached collaterally by proof that the judgment was wrong. For instance, a common-law court ought not to give judgment for the plaintiff upon a parol promise without consideration, but if it does so the judgment is not open to collateral attack. Even words in a statute that might seem to affect the power of the court, such as 'no action shall be brought' in the Statute of Frauds, are assumed without question merely to fix the law by which the court should decide, as is explained in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. We see no reason why the ordinary rule should not apply to this case.

But it is said that, whether the statutes go to the jurisdiction or not, they establish a condition precedent. Of course all defences disclose conditions precedent to the successful maintaining of the action; but more than that must be meant, and we take the argument to be that the statute extinguishes the right if the suit is not brought in time and therefore creates a condition precedent to the right of the appellees. But that abstract proposition does not decide the case. The question before us is a question of pleading, and not every matter that may affect the existence of the right at the time of bringing suit must be dealt with by the plaintiff in stating his cause of action. A release under seal destroys a right as fully as prescription could, yet a plaintiff does not have to deny a release in his declaration. Usually, if facts have arisen since the cause of action accrued, that take it away, it is more convenient and it is required that the defendant should allege them, rather than that the plaintiff should be called

on to deny in the first place all possible matters of that sort. *Sawyer* v. *Boston*, 144 Massachusetts, 470, 472. "For if he should do so, the declaration would be more prolix than was convenient." *Hawkings* v. *Billhead*, Cro. Car. 404. "The mere fact that the time of bringing suit goes in some sense to the jurisdiction of the court does not necessarily take the case out of the general rules of pleading." *Sawyer* v. *Boston*, 144 Massachusetts, *supra*. It would seem, as observed by the court below, that the defendant was free to renounce the objection if he saw fit. We know of no public policy that would prevent his permitting the appellees to acquire rights that earlier they were entitled to. So that on this ground as well as on that of convenience we are of opinion that the general rule of pleading applies.

The only matter remaining to be mentioned is a suggestion that the Supreme Court should have sent the case back to the lower court to give the appellant an opportunity to cross-examine the appellees, but there being no question of the power of the Supreme Court we should be slow to control its discretion on this point.

Judgment affirmed.

JONES, TRUSTEE IN BANKRUPTCY OF ORO DREDGING COMPANY, *v.* SPRINGER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 23. Argued October 30, November 4, 1912.—Decided December 2, 1912.

A *bona fide* purchaser for value of perishable property held under attachment at a sale made by order of the local court gets a good title notwithstanding bankruptcy proceedings had been instituted within four months after the attachment and had proceeded to adjudication before the sale.

An order to sell attached property on the ground that it is perishable is not one to enforce the lien of the attachment but one incidental to the preservation of the property, and the court having the custody has the jurisdiction to sell.

A proceeding to sell perishable property is one *in rem* and the purchaser gets title against all the world.

A local court having the custody under attachment of perishable goods may order a sale if necessary to protect and it is not necessary that such sale be made under General Order XVIII, 3, in order to validate it.

An order for sale of perishable property held under attachment, made by the local court within the terms of the local act, will not be set aside by this court.

Even if the local statute permitting sales of perishable property held in *custodia legis* be broader than General Order XVIII, 3, this court will not for that reason only set aside a sale made by the local court if within the terms of the local act.

As to whether property is perishable or not, this court will follow the rulings of a territorial court in the absence of a strong reason to the contrary.

15 N. Mex. 98, affirmed.

THE facts are stated in the opinion.

Mr. Elmer E. Studley and *Mr. J. E. MacLeish*, with whom *Mr. Frank H. Scott* and *Mr. Edgar A. Bancroft* were on the brief, for appellant:

After the petition in bankruptcy was filed the assets of the bankrupt were in *custodia legis*, and the jurisdiction of the bankruptcy court to sell the same was exclusive. The sale to Springer was had subsequent to the order of adjudication in bankruptcy, and he was charged with notice of the pendency of the bankruptcy proceedings and could obtain no title superior to that of the trustee.

No title passed to the purchaser of the dredge, because the proceedings to sell and the sale were had subsequent to the entry of the order of adjudication in the bankruptcy proceedings. The proviso to § 67f protecting the title of an innocent purchaser for value, is no protection to

appellee, as the same does not apply to the sale made in this case, nor does it under any circumstances contemplate a purchase subsequent to an adjudication in bankruptcy. Bankruptcy Act of 1898, §§ 67f, 70; *Conner* v. *Long*, 104 U. S. 228, 231; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Bank* v. *Sherman*, 101 U. S. 403, 406; *Mueller* v. *Nugent*, 184 U. S. 1, 14; *Lamp Chimney Co.* v. *Ansonia Brass Co.*, 91 U. S. 656, 661; *In re Granite City Band*, 137 Fed. Rep. 818; *State Bank* v. *Cox*, 134 Fed. Rep. 91; *Clarke* v. *Larremore*, 188 U. S. 486.

The sale in this case was not had in a proceeding to enforce a preëxisting lien, and the adjudication of the territorial court ended, although not appearing upon its own record, when the adjudication was entered in the bankruptcy proceedings. *Conner* v. *Long*, 104 U. S. 228, 239, 240; *In re Watts & Sacks*, 190 U. S. 1, 27; *Eyster* v. *Gaff*, 91 U. S. 521; *Doe* v. *Childers*, 21 Wall. 642.

Subsequent to adjudication, perishable property, like all other property of the bankrupt, must be sold in the bankruptcy court. Cases *supra*, and see General Order in Bankruptcy, XVIII.

Assuming the jurisdiction of the territorial court to sell perishable property was concurrent with that of the bankruptcy court the sale was improper.

The dredge was not perishable property within the meaning of those words as contemplated by the sale of perishable property in bankruptcy proceedings, in that the dredge was in the custody of the bankruptcy court and could have been conserved, and the same was not destroyed, or expensive to keep, in the sense that it ought to have been sold. *Bryan* v. *Bernheimer*, 181 U. S. 188; General Order in Bankruptcy, XVIII.

The dredge was not perishable property within the meaning of the statute of the Territory of New Mexico relating to sales of property of a perishable nature and liable to be lost before final adjudication.

The proceedings to sell the dredge were irregular and unwarranted, and not such as were contemplated by the statute, in that final adjudication in the attachment proceedings, upon the record in that cause, could have been had on the same day that the application was made and granted to sell the dredge, and no petition was filed setting out the kind, nature and condition of the property, as required by statute. *Mosher* v. *Bay Circuit Judge*, 108 Michigan, 579; *Oneida National Bank* v. *Paldey*, 2 Mich. N. P. 221; *Newman* v. *Cain*, 9 Nevada, 234; *Goodman* v. *Moss*, 64 Mississippi, 303; *Weis* v. *Basket*, 71 Mississippi, 771; Comp. Laws New Mex., 1897, § 2716, and see also § 2685, Art. VIII, Sub-sec. 103–106.

The sale of the dredge was not confirmed before the purchaser had actual knowledge of the bankruptcy proceedings.

No order confirming said sale to appellee was entered prior to the appearance of the trustee in bankruptcy in said cause, and although the court found that the sale was confirmed on July 17, such finding is not supported by the record. The court also found that the purchaser knew of the bankruptcy proceedings on June 26, two weeks after his purchase.

Mr. Ernest Knaebel, with whom *Mr. Charles A. Speiss*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for appellee:

The appellee purchased the dredge at a sale ordered by the judge of the District Court of Colfax County in the rightful exercise of conceded jurisdiction without knowledge on the part of the court or of appellee of the pendency of the bankruptcy proceedings in Illinois. Appellee, therefore, obtained a perfect title to the dredge. *Eyster* v. *Gaff*, 91 U. S. 521; *Doe* v. *Childers*, 21 Wall. 642; *Kent* v. *Downing*, 44 Georgia, 116; *In re Irwin Davis*, 1 Sawyer, 260; *In re Fuller*, 1 Sawyer, 243; *Bracket* v. *Dayton*, 34

Minnesota, 219; *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33; *Muser* v. *Kern*, 55 Fed. Rep. 916; *Morning Telegraph Co.* v. *Hutchinson Co.*, 8 L. R. A. (N. S.) 1232; *Mueller* v. *Nugent*, 184 U. S. 1; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, 352, reversing 135 Fed. Rep. 52; *In re Rathman*, 183 Fed. Rep. 913, 924; *Jaquith* v. *Rowley*, 188 U. S. 620, 625; *Hiscock* v. *Varick Bank*, 206 U. S. 28. *Conner* v. *Long*, 104 U. S. 228, is not favorable to the appellants, but is directly opposed to their contentions.

Appellee's title to the dredge is in nowise dependent upon the validity of the attachment proceedings, nor does it in anywise depend upon the question of whether or not the title became vested in the trustee in bankruptcy as of the date of the filing of the petition. He purchased the dredge at a sale ordered by the New Mexico court in a proceeding *in rem*, having for its purpose the transmutation of perishable property, or property liable to be lost or diminished in value, into imperishable money. *Young* v. *Kellar*, 94 Missouri, 581; *Betterton* v. *Eppstein*, 14 S. W. Rep. 861. The proceeds of the sale simply took the place of the attached property without interfering with prior liens. *State* v. *Judge*, 44 La. Ann. 87; *Pollard* v. *Baker*, 101 Massachusetts, 259; *Taylor* v. *Thurman*, 12 S. W. Rep. 614; *Welsh* v. *Lewis*, 81 Georgia, 387.

The object of the statute permitting sale of property expensive to keep or perishable, before judgment, is for the benefit of both parties or any third party who claims it. *Pollard* v. *Baker*, 101 Massachusetts, 259; *Peters* v. *Aehle*, 31 Missouri, 380; *York* v. *Sanborn*, 47 N. H. 403.

The correctness of an order for the sale of the attached property before judgment, or determining the propriety of such sale will not be reviewed, nothing appearing affirmatively impeaching it, but the propriety thereof will be presumed. *McCreery* v. *Barney Nat'l Bank*, 116 Alabama, 224; *Runner* v. *Scott*, 150 Indiana, 441; *Dunn* v. *Salter*, 1 Dno. Ky. 342; *In re Le Vay*, 125 Fed. Fep. 990.

The word "perishable" is very elastic. It does not mean simply property liable to decay. It should receive a liberal rather than a narrow construction and embraces property the keeping of which may render it of no value in the end to satisfy the claims, and in this sense almost any property subject to attachment may be sold as perishable. *McCreery* v. *Barney National Bank*, 116 Alabama, 224; *Young* v. *Davis*, 30 Alabama, 113; *Schumann* v. *Davis*, 13 N. Y. Supp. 575; *Southern Railroad Co.* v. *Sheppard*, 20 S. E. Rep. 481; *Anonymous* v. *Horse and Chaise*, 18 N. J. Law, 26; *Mosher* v. *Bay Circuit Judge*, 108 Michigan, 579.

Appellee is a *bona fide* purchaser for value of the dredge, and his title is recognized and protected by the very provisions of the Bankruptcy Act which opposing counsel contend have destroyed or prevented the acquisition by him of his title. *Clark* v. *Larremore*, 188 U. S. 486; *In re Franks*, 95 Fed. Rep. 635.

The Bankruptcy Act does not by any of its provisions make the fact of adjudication constructive notice. As to who is a *bona fide* purchaser at common law, see *Spicer* v. *Waters*, 65 Barb. 227; Perry on Trusts, 218; *Alden* v. *Trubee*, 44 Connecticut, 455.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here upon appeal from a judgment denying the title of the appellant as trustee in bankruptcy to property formerly belonging to the bankrupt and sold in this suit by order of the local court. The facts are these. The property in question is a mining dredge. It was attached on February 27, 1906, and a receiver was appointed on March 19. On May 1, a petition was filed for an order directing the dredge to be sold on the ground that it was 'of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the

case,' within the Compiled Laws of New Mexico, 1897, § 2716, and an order to that effect was made on the same day. The ground of the finding on which the sale was ordered was that the dredge was anchored in an embanked pond fed by a mountain stream subject to heavy floods, and was liable to damage from that source. The sale took place on June 26, and the dredge was bought in good faith and without notice of the defendant's insolvency, at a price of five thousand dollars paid into court, by the appellee, Springer. The sale was confirmed on July 17. But on March 12, 1906, a petition in bankruptcy had been filed in the Northern District of Illinois against the Oro Dredging Company, the defendant in this suit. On April 23, the company was adjudged a bankrupt. On July 9, the appellant was appointed trustee and on July 19 qualified. On August 2, he first appeared in this cause, that being the first notice of the adjudication received by the parties concerned or the court. He filed an intervening petition praying that the order of sale be set aside, the attachment dissolved and the property turned over to him. The petition so far as it affects the dredge was denied, the judgment was affirmed by the Supreme Court of the Territory and the trustee appealed.

The main ground of the appeal is that by § 70 of the Bankruptcy Act the title of the trustee related back to the date of the adjudication of bankruptcy, and that, as matter of law, Springer could not be a *bona fide* purchaser within the proviso of § 67f saving the title of a *bona fide* purchaser for value who shall have acquired the property by the attachment without notice or reasonable cause for inquiry. It is argued that filing the petition in bankruptcy was a caveat to all the world, *Mueller* v. *Nugent*, 184 U. S. 1, 14, and that the above proviso can have effect only when the judgment and sale took place before the petition was filed.

We have no occasion to consider the last proposition in order to decide this case, or what effect, if any, the pro-

viso has upon some language in *Conner* v. *Long*, 104 U. S. 228, relied upon by the appellant (see *Clarke* v. *Larremore*, 188 U. S. 486, 488), the proceeding not having been one to enforce the lien of the attachment but simply an order made on a finding that, in the language of the New Mexico statute, 'the interests of both plaintiff and defendant will be promoted by the sale of the property.' But the proposition quoted from *Mueller* v. *Nugent* must be taken with reference to the facts then before the court and not as applicable to all intents and purposes. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, 353. *Hiscock* v. *Varick Bank*, 206 U. S. 28, 41. *In re Rathman*, 183 Fed. Rep. 913, 924, 925. It is true that the estate is regarded as *in custodia legis* from the date of the petition as against a subsequent attachment. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 306, 307. But in a case like the present where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings. *Eyster* v. *Gaff*, 91 U. S. 521, 524, 525. *Scott* v. *Ellery*, 142 U. S. 381, 384. *Jaquith* v. *Rowley*, 188 U. S. 620, 626. *Frank* v. *Vollkommer*, 205 U. S. 521, 529. *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33.

The jurisdiction of the territorial court not having been avoided and that court having the actual custody of the *res*, it had the power to preserve the subject-matter of the controversy that necessarily is incident to such conditions. An illustration although not a perfect analogy is to be found in *United States* v. *Shipp*, 203 U. S. 563, 573. An appeal had been taken to this court on a petition for *habeas corpus*, where a prisoner was held under sentence of a state court, and pending the appeal this court had ordered the custody of the appellant to be retained. Shipp was charged with contempt for having been party

to a conspiracy that ended in lynching the prisoner. It was strongly argued that neither the Circuit Court that refused the writ nor this court had any jurisdiction of the case, but it was held that, whether it had jurisdiction or not, until the question was decided this court had authority from the necessity of the case to preserve the subject of the petition. A similar authority existed in the territorial court until the trustee saw fit to intervene, which, so far as would have appeared at the time of the sale had anyone known of the bankruptcy proceedings, he might never do. According to Marshall, C. J., "a right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use." *Jennings* v. *Carson*, 4 Cranch, 2, 26. The recognition of a power springing from necessity is of old standing in English law. *Eyston* v. *Studd*, Plowd. 459, 466. 2 Inst. 168; *Baker* v. *Baker*, 1 Ventris, 313. See further *Young* v. *Kellar*, 94 Missouri, 581. *Betterton* v. *Eppstein*, 78 Texas, 443. *In re Le Vay*, 125 Fed. Rep. 990, 992.

It is argued that if a sale was necessary the court of bankruptcy could have directed it under General Order XVIII, 3, and that its power was exclusive. But such a rule would much impair the usefulness of the principle. The trustee if appointed may not know the condition of the property or be prepared to decide. The court having the actual custody of the *res* does not know of the bankruptcy proceedings. There is a necessity for immediate action and no one is ready to act. If the local court in its ignorance directs a sale and the purchaser is chargeable with notice that there may be somewhere a petition filed that will destroy his title, the doubt affects the price that he will give, and if the sale turns out effective the goods have been sacrificed. The very reason of the rule that permits a good title to be given by an authority that has

none contradicts the limitation supposed. We are of opinion that the power of the territorial court remained. "For necessity (which is excepted out of the law) the sale in that case is good." 2 Inst. 168. The proceeding is *in rem*, against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place.

Finally it is argued that the court of bankruptcy must decide whether the property is perishable or not, and that this property was not within the power conferred by the statute of New Mexico. The first proposition is little more than the one last discussed in another form. But assuming that for any reason we could go behind the findings on which the case comes here we see no reason for doing so, if the sale was within the terms of the local act. On that question, as usual, we follow the ruling of the Supreme Court of the Territory unless there are stronger reasons to the contrary than are shown here. *Fox* v. *Haarstick*, 156 U. S. 674. *Albright* v. *Sandoval*, 216 U. S. 331, 339. The act as construed, though possibly broader than General Order XVIII, 3, does not go beyond the principle of necessity, at least as applied to this case.

Judgment affirmed.

CENTRAL LUMBER COMPANY *v.* STATE OF SOUTH DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 51. Argued November 13, 14, 1912.—Decided December 2, 1912.

Regulating discriminatory sales made within the State for the purpose of destroying competition is within the legislative power of the State unless the statute conflicts with the Constitution of the United States.

The legislature of a State may direct its police regulations against what it deems an existing evil without covering the whole field of possible abuses. It may direct a law for the protection of trade in accord with its policy against one particular instrument of trade war.

The Fourteenth Amendment does not prohibit state legislation special in character. The legislature may deal with a class which it deems a conspicuous example of what it seeks to prevent, although logically that class may not be distinguishable from others not embraced by the law.

A classification that logically affects only those who deal in more than one place in the State is not necessarily so unreasonable as to amount to denial of equal protection of the laws.

This court cannot review the economics or facts on which the legislature of a State bases its conclusions that an existing evil should be remedied by an exercise of the police power.

The enactment of police statutes regulating discrimination in prices for the purpose of destroying competition in several States demonstrates that there is a widespread conviction in favor of such regulation.

Chapter 131 of the Laws of South Dakota of 1907, prohibiting unfair discrimination by anyone engaged in manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in other sections, after equalization for distance, is a constitutional exercise of the police power of the State and is not unconstitutional under the Fourteenth Amendment as depriving persons having more than one place of business in the State of their property without due process of law, or as denying them the equal protection of the laws, or as abridging their liberty of contract.

Where the highest court of a State has construed a statute as aiming at the prevention of a monopoly in a commodity by means likely to be employed and prohibited by the statute, this court should read the statute as having ultimately in view the benefit of buyers of the goods.

24 So. Dak. 136, affirmed.

THE facts, which involve the constitutionality under the Federal Constitution of the "one price" statute of the State of South Dakota, are stated in the opinion.

Mr. David F. Simpson, with whom *Mr. L. L. Brown*, *Mr. Wm. A. Lancaster* and *Mr. Milton D. Purdy* were on the brief, for plaintiff in error.

Mr. Royal C. Johnson, Attorney General of the State of South Dakota, *Mr. Samuel W. Clark* and *Mr. James M. Brown*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was found guilty of unfair discrimination under Session Laws of South Dakota for 1907, c. 131, and was sentenced to a fine of two hundred dollars and costs. It objected in due form that the statute was contrary to the Fourteenth Amendment, but on appeal the judgment of the trial court was sustained. 24 So. Dak. 136. By the statute anyone "Engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," &c., shall be guilty of the crime and liable to the fine.

The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the Constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, because it affects the conduct of only a particular class—those selling goods in

two places in the State—and is intended for the protection of only a particular class—regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offence, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205.

That is not the arbitrary selection that is condemned in such cases as *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. The Fourteenth Amendment does not prohibit legislation special in character. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62. If a class is deemed to pre-

sent a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411. We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. *State* v. *Drayton*, 82 Nebraska, 254. *State* v. *Standard Oil Co.*, 111 Minnesota, 85; 126 N. W. Rep. 527. *State* v. *Fairmont Creamery*, 153 Iowa, 702; 133 N. W. Rep. 895. *State* v. *Bridgeman & Russell Co.*, 117 Minnesota, 186; 134 N. W. Rep. 496.

What we have said makes it unnecessary to add much on the second point, if open, that the law is made in favor of regular established dealers—but the short answer is simply to read the law. It extends on its face also to those who intend to become such dealers. If it saw fit not to grant the same degree of protection to parties making a transitory incursion into the business, we see no objection. But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods.

Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids a certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this court that we simply refer to *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567, 568, and the cases there cited to illustrate how much power is left in the States. See also *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 442. *Lemieux* v. *Young*, 211 U. S. 489, 496. *Otis* v. *Parker*, 187 U. S. 606, 609.

Judgment affirmed.

SOUTHWESTERN BREWERY AND ICE COMPANY *v.* SCHMIDT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 55. Argued November 14, 15, 1912.—Decided December 2, 1912.

A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place for the servant to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise to remove the source of danger.

Even if it is open, it will require a strong case to induce the appellate court to review the discretion of the trial court in allowing leading questions; in this case, the witness being a foreigner who seemingly did not understand the English language, there is no ground for revision.

This court will not go behind the decision of the Supreme Court of a Territory upon a matter of local practice in order to reverse the judgment upon a technicality and an assumption contrary to a fact appearing in the record.

In this case the trial court appears to have properly instructed the jury in regard to damages to which the plaintiff was entitled for personal injury, and did not as to future pain, etc., go beyond conservative rules laid down in such cases.

The court may, within conservative rules, instruct the jury that they may, in estimating the damages of a plaintiff in a personal injury suit, consider loss of time with reference to ability to earn money, temporary or permanent impairment of capacity to earn money, disfigurement and pain, past or reasonably certain to be suffered in the future. See *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Lindeman*, 143 Fed. Rep. 946.

Where the charge directs that the jury deduct from damages amounts paid under a release executed by plaintiff, if the jury set the release aside it is immaterial what the amounts so paid represented as the transaction was rescinded by the verdict.

15 N. Mex. 232, affirmed.

THE facts, which involve the validity of a verdict for personal injuries, are stated in the opinion.

Mr. Francis E. Wood, with whom *Mr. O. N. Marron* was on the brief, for plaintiff in error:

The trial court erred in refusing to grant defendants' motion for judgment in its favor on the special findings of the jury.

This is an action for negligence, not on contract. To maintain it, the first step must be to establish some breach of duty, some actionable negligence on the part of the appellant.

The general verdict for plaintiff is inconsistent with the special finding, and the special finding must prevail. Sec. 2993, Comp. Laws of New Mexico of 1897. This section was examined and approved in *Walker* v. *Southern Pacific Ry. Co.*, 165 U. S. 593.

The law imposed on the defendant in this case only the obligation to use reasonable and ordinary care and diligence in keeping the cooker in a reasonably safe condition for use. It did not make him an insurer of the condition

of the cooker or of the safety of the plaintiff. 20 A. & E. Enc. 74; Shearman & Redf. on Negligence, § 189, 4th Ed.; *Probst* v. *Delamater*, 100 N. Y. 272; *Brymer* v. *Southern Pac. Co.*, 27 Pac. Rep. 371; 26 Cyc. 113–168; Labatt on Master and Servant, § 110; see also *Moore* v. *Wabash Ry. Co.*, 85 Missouri, 588; *Bailey* v. *R. W. & O. Ry.*, 139 N. Y. 302.

Plaintiff was entirely familiar with the cooker. He had had charge of it and used it for a year. He understood and appreciated the risk, as well as an ordinarily prudent man could do. He knew the kettle was cracked and leaking in May, 1905, at least seven months before the injury.

The jury having expressly found that it was not so defective that a reasonably prudent man would not have used it, the defendant is not legally liable for damages resulting from its use.

To require a greater measure of care than this of the defendant was to require a greater amount than the law imposes upon him.

A promise to change conditions, the existence of which is not negligence, gives no right of action if injury results from such condition while the promise remains unfulfilled. *Sweeney* v. *Jones Elevator Co.*, 101 N. Y. 520; Shearman & Redf. on Negligence, § 186.

It is the original negligence of the defendant that is the base of the cause of action and not the promise to repair. *Coin* v. *Talge*, 222 Missouri, 499, and see note in 25 L. R. A. (N. S.) 1179. See also *Andrecsic* v. *N. J. Tube Co.*, 73 N. J. Law, 664; *I. & G. N. R. Co.* v. *Williams*, 82 Texas, 342; *Dunkerly* v. *Webendorfer Mach. Co.*, 71 N. J. Law, 60; *Obanheim* v. *Arbuckle*, 80 App. Div. 465; *Bodie* v. *C. & W. C. R. Co.*, 61 S. Car. 468; *Reiser* v. *S. P. M. & L. Co.*, 114 Kentucky, 1. *Hough* v. *Railroad Co.*, 100 U. S. 224, and *Gowan* v. *Harley*, 56 Fed. Rep. 973, cited by defendant in error, do not sustain his contention.

It was reversible error to allow leading questions to be put to the plaintiff to elicit evidence that he was induced to use the cooker by the promise to repair it and would not have used it otherwise. *Lewis* v. *N. Y. &c. R. Co.*, 153 Massachusetts, 73; *S. P. Co.* v. *Leash*, 2 Tex. Civ. App. 68; *Brewer* v. *T. C. I. & R. Co.*, 97 Tennessee, 615; *Harris* v. *Bottum*, 81 Vermont, 346; *Hollis* v. *Widner*, 221 Pa. St. 72; *Halloran* v. *U. L. & T. Co.*, 133 Missouri, 420; Wigmore on Evidence, § 357.

There was no credible evidence sufficient to sustain a verdict that the plaintiff continued to use the cooker because of the promise of repair.

It was error for the trial court to refuse to charge that the burden was on the defendant to establish by a preponderance of evidence that he was incompetent to make a binding contract at the time the release was executed.

Weakness of understanding is not, of itself, any objection in law to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property. *Jones* v. *Jones*, 137 N. Y. 610, 613; *Taylor* v. *Butterick*, 165 Massachusetts, 547; *Wyatt* v. *Walker*, 44 Illinois, 485; *Artrip* v. *Ramake*, 96 Virginia, 277, and see a note collecting the cases upon this point, 36 L. R. A. 731.

The court erred in its instruction to the jury on the measure of damages and in refusing the defendant's requested instruction upon that subject.

Under the instruction as given the jury were permitted to give speculative damages for some assumed impaired earning capacity from the time of the injury down to the time of the trial.

The measure of damages for loss of earning capacity is the difference between what was earned before the injury and what he would be able to earn thereafter, *Braithwait* v. *Hall*, 168 Massachusetts, 38, and the injured party is

required to use all reasonable efforts to reduce the damages. 4 Suth. Dam., § 1255.

If the party has received compensation or wages between the time of the injury and the trial he can recover nothing for loss of such wages. *Drinkwater* v. *Dinsmore*, 80 N. Y. 390; *Montgomery* v. *Mallett*, 92 Alabama, 209.

In this case the plaintiff had been fully compensated for loss of wages or earnings and all other expenses incident to his injury, and he was only entitled to recover as past damages, compensation for pain and suffering. Wherever the plaintiff has been able to earn as much since as before the injury, the jury should not consider the item of impairment of earning capacity. 8 A. & E. Enc. 654; *Kane* v. *Rd. Co.*, 95 Georgia, 858; *M. C. R. Co.* v. *Mitten*, 13 Tex. Civ. App. 653; *Drinkwater* v. *Dinsmore*, *supra*.

The court erred in instructing the jury to consider future pain and anguish in assessing damages. *Shultz* v. *Griffith*, 103 Iowa, 150. See also *Illinois Iron Co.* v. *Helner*, 196 Illinois, 526; *Carter* v. *Nunda*, 66 N. Y. Supp. 1059; 6 Thomp. on Negligence, 2794.

Mr. Neill B. Field for defendant in error:

The special findings are harmonious with each other and with the general verdict.

The master is liable, during the running of his promise to repair a known defect, in all cases unless the servant, either by continuing the service an unreasonable length of time or by the use of the appliance when in an imminently dangerous condition has by his own conduct released the master. *Hough* v. *R. R. Co.*, 100 U. S. 213; *R. R. Co.* v. *Young*, 49 Fed. Rep. 723; *Gowen* v. *Harley*, 56 Fed. Rep. 973; *Detroit Crude Oil Co.* v. *Grable*, 94 Fed. Rep. 73; *Chicago &c. Co.* v. *Van Dan*, 36 N. E. Rep. 1024; *Breckenridge Co.* v. *Hicks*, 22 S. W. Rep. 554; *Lutz* v. *Ry. Co.*, 6 N. Mex. 496; *Kane* v. *Northern Central Ry.*, 128 U. S. 91,

94; 2 Bailey, Master and Servant, § 3073; *Choctaw &c. Ry. Co.* v. *McDade*, 191 U. S. 64; *Crookston Lbr. Co.* v. *Boutin*, 149 Fed. Rep. 680.

The trial court correctly charged the jury with reference to the burden of proof, but if the charge were silent as to this, such silence would be wholly immaterial.

In questions of practice based upon local statutes and procedure, this court habitually follows the local court. *Sweeney* v. *Lomme*, 22 Wall. 208; *Fox* v. *Haarstick*, 156 U. S. 674; *Armijo* v. *Armijo*, 181 U. S. 558; *Copper Queen Co.* v. *Bd. of Equalization*, 206 U. S. 474; *Lewis* v. *Harrara*, 208 U. S. 309; *English* v. *Arizona*, 214 U. S. 359; *Santa Fe County* v. *Coler*, 215 U. S. 296.

The charge upon the measure of damages is amply supported by authority. 4 Suth. Dam., 3d Ed., §§ 1241, 1242, 1246, 1251; *Chicago & N. W. Co.* v. *De Clow*, 124 Fed. Rep. 142; *Union Pac. Ry. Co.* v. *Jones*, 49 Fed. Rep. 346; *Swenson* v. *Bender*, 114 Fed. Rep. 1; *Kliegel* v. *Aitken*, 94 Wisconsin, 432; *Washington &c. Ry. Co.* v. *Harmon*, 147 U. S. 571; *Chicago &c. Ry. Co.* v. *Lindeman*, 143 Fed. Rep. 946.

The jury found specially every fact necessary to fix the liability of the plaintiff in error. *Emerson* v. *Metropolitan Life Co.*, 185 Massachusetts, 318; *Germaine* v. *Muskegon*, 105 Michigan, 213; *Tesch* v. *Milwaukee Co.*, 108 Wisconsin, 593.

Mr. Justice Holmes delivered the opinion of the court.

This is an action by a servant for personal injuries. The declaration alleged that it was the plaintiff's duty to cook brewer's mash in a cooker, that the cooker was so out of repair that the plaintiff was unwilling to use it, but that the defendant requested him to go on until it could be repaired and promised that it should be within a very

short time; that the plaintiff did go on, relying upon the promise, that the cooker gave way and the plaintiff was badly scalded. The defendant denied the allegations and pleaded plaintiff's contributory negligence and a release. In a replication the plaintiff denied his mental capacity at the time the release was made. There was a verdict for the plaintiff subject to special findings which by the law of New Mexico control, *Walker* v. *New Mexico & Southern Pacific R. R. Co.*, 165 U. S. 593, and the defendant alleged exceptions. These were overruled by the Supreme Court of the Territory and the judgment affirmed.

The first point argued is that the defendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evident that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the theory of the exception, 1 Labatt, Master and Servant, ch. 22, § 423, it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed. *Hough* v. *Texas & Pacific R. R. Co.*, 100 U. S. 213.

Next it is argued that the judgment should be set aside because the court allowed somewhat leading questions to be asked to bring out the plaintiff's reliance upon the defendant's promise. If this matter is open it is enough to say that the plaintiff is a German and seemingly did not

understand the questions put to him very well, and that it would require a very much stronger case than this to induce an appellate court to revise the discretion of the trial court and grant a new trial upon such a ground. *Northern Pacific R. R. Co.* v. *Urlin*, 158 U. S. 271, 273. The next point, that there was no credible evidence to sustain the verdict, so far as it does not rest on the preceding one, was for the jury, not for this court.

Fourthly it is argued that the court erred in refusing to instruct the jury that the burden was on the plaintiff to prove his incompetence at the time of making the release. It seems from the record that an instruction to that effect was given but that it was omitted from the bill of exceptions. The Supreme Court of the Territory took notice of the fact, and we certainly should not go behind their decision upon a matter of local practice in order to reverse a judgment upon a technicality and an assumption contrary to the fact. *Santa Fe County* v. *Coler*, 215 U. S. 296.

Finally it is said that the instructions as to the measure of damages were wrong. The court instructed the jury that they might consider the plaintiff's loss of time with reference to his ability to earn money, the impairment of his capacity to earn money, whether temporary or permanent, disfigurement, and pain, past or reasonably certain to be suffered in the future—and that they should deduct from the amount, if any, the disbursements made under the release which the finding of the jury set aside. It is objected that a part of the disbursements were wages during the plaintiff's disability, but it did not matter whether they were or not if the transaction was rescinded. With regard to future pain &c. the judge did not go beyond the conservative rule laid down in such cases as *Chicago, M. & St. P. Ry. Co.* v. *Lindeman*, 143 Fed. Rep. 946, 950. The rest of the argument is a discussion of evidence with which we have nothing to do.

Judgment affirmed.

MILLER *v.* GUASTI.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 478. Submitted October 15, 1912.—Decided December 2, 1912.

A debt of the bankrupt not properly scheduled as required by § 7 of the Bankruptcy Act is not barred by the discharge if the creditors had no notice or actual knowledge of the proceeding.

A finding by the Circuit Court of Appeals that the bankrupt had actual knowledge of the residence and address of the creditor is binding on this court.

203 N. Y. 259, affirmed.

THE facts are stated in the opinion.

Mr. Albert M. Yuzzolino for defendants in error, in support of a motion to affirm the judgment.

Mr. William C. Rosenberg for plaintiff in error, in opposition thereto.

Memorandum opinion, by direction of the court, by MR. JUSTICE DAY.

Tobias Miller, plaintiff in error herein, obtained a discharge in bankruptcy in the District Court of the United States for the Southern District of New York. Among his liabilities was a judgment rendered in the City Court of New York April 16, 1895, in favor of the defendants in error, Guasti and Bernard. Miller applied at a Special Term of the Supreme Court of the County of New York for an order cancelling the judgment under § 1268 of the Code of Civil Procedure because of the discharge in bankruptcy. The Supreme Court held that he was not entitled to have the judgment cancelled. The order was affirmed by the Appellate Division and its order was affirmed by the Court of Appeals. 203 N. Y. 259. That order being entered in the Supreme Court, this writ of error was sued out. A motion is made here to affirm the judgment of the state court.

From the facts found in the Court of Appeals it appears that Miller in his bankruptcy schedules set forth that the residence and occupation of Guasti and Bernard, holders of the judgment, were "Unknown.—California." The court further found that Guasti and Bernard knew nothing of the proceedings in bankruptcy until long after the discharge, and first learned of them August 23, 1910. The Court of Appeals further found that the affidavits filed sustained the finding of the Special Term that Miller had actual knowledge of the residence and postoffice address of Guasti and Bernard. Such finding of fact is binding upon this court, and is moreover amply sustained by the record.

The Bankruptcy Act provides, § 17:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

Section 7 of the Bankruptcy Act requires a bankrupt to file in court a schedule made under oath containing, among other things, "a list of his creditors, showing their residences, if known, if unknown, that fact to be stated," etc. It therefore appears that the Bankruptcy Act does not extend the protection of the discharge to debts not duly scheduled in time for proof and allowance.

In view of the facts found, it is manifest that the debt of Guasti and Bernard was not scheduled as it should have been in order to make the discharge operative as to it. Their residence, though found to be known, was not stated as required by the act, and the creditor did not have actual knowledge of the bankruptcy proceedings until long after their termination. We think the correctness of the judgment is so plain as not to require further argument.

Affirmed.

FOUR HUNDRED AND FORTY-THREE CANS OF FROZEN EGG PRODUCT *v.* UNITED STATES.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 590. Argued October 24, 25, 1912.—Decided December 2, 1912.

The provision in § 10 of the Pure Food Act of June 30, 1906, 34 Stat. 768, c. 3915, that proceedings for seizure of goods shall be by libel and conform, as near as may be, to proceedings in admiralty, does not include appellate proceedings; the action of the District Court on the libel can only be reviewed as at common law by writ of error and not by appeal.

When Congress enacted the Pure Food Act it was known that as to seizures on land the District Court proceeded as in actions at common law.

The provision for jury trial in § 10 of the Pure Food Act was probably inserted by Congress with a view to removing any question of constitutionality of the act.

While proceedings for seizure and condemnation under § 10 of the Pure Food Act are intended to be summary, the owner, as this court construes the statute, has a right to a hearing in a court of record, with a right of review upon questions of law by writ of error in the Circuit Court of Appeals, and where more than $1,000 is involved finally in this court under § 6 of the Circuit Court of Appeals Act.

As the Circuit Court of Appeals had no jurisdiction to review the action of the District Court on a libel filed under the Pure Food Act, neither its own action thereon nor the consent of the parties could give such jurisdiction.

Where the Circuit Court of Appeals proceeds without jurisdiction this court should, on acquiring jurisdiction of the cause, remand it to the Circuit Court of Appeals with instructions to dismiss the appeal for want of jurisdiction.

193 Fed. Rep. 589, reversed.

THE facts are stated in the opinion.

Mr. Ralph S. Rounds for appellant and plaintiff in error:

The proceeding was one at common law which the Circuit Court of Appeals could acquire no jurisdiction to re-

view by appeal, and appeal having been taken and not error, the judgment reversing the decree of the trial court is void for lack of jurisdiction.

Although this statute prescribes that the proceedings shall conform "as near as may be to the proceedings in admiralty," the proceeding being a seizure on land is, in its nature, a common-law proceeding. *The Sarah*, 8 Wheat. 391; *Morris's Cotton*, 8 Wall. 507; *United States* v. *Bales of Cotton*, 154 U. S. 556; *Union Insurance Co.* v. *United States*, 6 Wall. 759; *Armstrong's Foundry*, 6 Wall. 766; *St. Louis Street Foundry*, 6 Wall. 770; *United States* v. *Emholt*, 105 U. S. 414.

The objection that the case was not properly before the Circuit Court of Appeals on appeal is jurisdictional and could not be waived. Consent will not give jurisdiction. *Brooks* v. *Norris*, 11 How. 204; *Barry* v. *Mercien*, 5 How. 103; *United States* v. *Curry*, 6 How. 106; *Jones* v. *La Vallette*, 5 Wall. 579; *Sarchet* v. *United States*, 12 Pet. 143; *Ballance* v. *Forsyth*, 21 How. 389; *Kelsey* v. *Forsyth*, 21 How. 85; *The Lucy*, 8 Wall. 307; *United States* v. *Emholt*, 105 U. S. 414.

The Circuit Courts of Appeals of the several circuits have given effect to the statute by consistently following the rule laid down by the Supreme Court. *Stevens* v. *Clark*, 62 Fed. Rep. 321; *De Lemas* v. *United States*, 107 Fed. Rep. 121; *Nelson* v. *Huidekoper*, 66 Fed. Rep. 616; *Leo Lung On* v. *United States*, 159 Fed. Rep. 125; Taylor on Jurisdiction of U. S. Supreme Court, § 119.

The practice followed by this court in cases where the trial court or intermediate appellate court is without jurisdiction is to reverse the decree and to direct the inferior court to dismiss the proceeding. *Mordecai* v. *Lindsay*, 19 How. 199; *Stickney* v. *Wilt*, 23 Wall. 150, 162; *United States* v. *Huckabee*, 16 Wall. 414, 435.

The Circuit Court of Appeals did not have, and could not by any procedure obtain, the right to review the

judgment below upon the facts, and its action in doing so was reversible error.

Proceedings of condemnation under the Pure Food Act are triable by jury under § 566, Rev. Stat., and where an issue of fact has been raised and trial had before the court without a jury, no question is open for review by the Circuit Court of Appeals, except those arising upon the process, pleadings or judgment, because there is no statutory or common-law provision allowing the review of the proceedings on trial in such a case. *Campbell* v. *Boyreau*, 21 How. 223; *Rogers* v. *United States*, 141 U. S. 548.

A proceeding for the condemnation of property on land is a common-law proceeding. *The Sarah*, 8 Wheat. 391; *Morris's Cotton*, 8 Wall. 507; *Union Insurance Co.* v. *United States*, 6 Wall. 759; *Armstrong's Foundry*, 6 Wall. 766; *United States* v. *Emholt*, 105 U. S. 414; *Parsons* v. *Bedford*, 3 Pet. 433; *Insurance Co.* v. *Comstock*, 16 Wall. 258; § 566, Rev. Stat.; *Parsons* v. *Bedford et al.*, 3 Pet. 433, 447.

It follows that unless a jury is waived a proceeding of condemnation under the Pure Food Act, being a common-law proceeding, must be tried before a jury, unless the provisions of § 566, Rev. Stat., have been modified or repealed by the provisions of that act.

If a jury is waived, however, the procedure is so irregular that an appellate court can acquire no jurisdiction to review the proceedings had at trial, although the judgment is not erroneous and will be upheld. *Kearney* v. *Case*, 12 Wall. 275. See § 10 of the Pure Food Act, cited with approval in *White* v. *United States*, 191 U. S. 545, 551.

Where Congress has changed the rule that common-law cases shall be tried by a jury, it has done so in plain and unmistakable terms. Sections 648, 649, Rev. Stat., authorize trials in the Circuit Court without a jury.

The trial had in the District Court being a trial of a common-law cause and a jury having been waived, the

judgment of the court was not open for review even upon writ of error, except as to errors arising from the process, pleadings or judgment. See *Dirst* v. *Morris*, 14 Wall. 484; *Insurance Co.* v. *Folsom*, 18 Wall. 237; *Cooper* v. *Omohundro*, 19 Wall. 65; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121; *Distilling & Cattle Feeding Co.* v. *Gottschalk Co.*, 66 Fed. Rep. 609; *Hill* v. *Walker*, 167 Fed. Rep. 241; *Bond* v. *Dustin*, 112 U. S. 604; *Dundee Mortgage Co.* v. *Hughes*, 124 U. S. 157; *Spalding* v. *Manasse*, 131 U. S. 65.

Mr. Assistant Attorney General Adkins, with whom *Mr. Louis G. Bissell* was on the brief, for the United States:

Congress has provided for the review of libels under the Food and Drugs Act by appeal where a jury trial is waived.

The entire proceedings, with the exception stated, are to conform to those in admiralty. The word "proceedings" covers all steps taken in a case from its inception, including those necessary to remove the case to a higher court for review. *O'Dea* v. *Washington County*, 3 Nebraska, 118; *Campbell* v. *United States*, 224 U. S. 99; *United States* v. *779 Cases of Molasses*, 174 Fed. Rep. 327.

Deland v. *Platte County*, 155 U. S. 221; *Oklahoma City* v. *McMaster*, 196 U. S. 529, are not pertinent, for Congress had not there prescribed the appellate procedure in the event of waiver of a jury trial.

But if appellant's construction were correct, the objection was waived in the Circuit Court of Appeals. *Mordecai* v. *Lindsay*, 19 How. 199; *Stickney* v. *Wilt*, 23 Wall. 150, distinguished.

The question of the proper method of review is important because of the uncertainty in the lower courts.

In some cases the review has been by appeal, *United States* v. *65 Casks of Liquid Extract*, 175 Fed. Rep. 102;

United States v. *74 Cases of Grape Juice*, 189 Fed. Rep. 331; and in others it has been by writ of error. *United States* v. *779 Cases of Molasses*, 174 Fed. Rep. 325; *United States* v. *275 Cases of Tomato Catsup*, 185 Fed. Rep. 405; *Hudson Manufacturing Co.* v. *United States*, 192 Fed. Rep. 920; *Henning* v. *United States*, 193 Fed. Rep. 52.

The trial in the Court of Appeals was properly a new trial upon the whole record.

Under the admiralty practice the appeal removed into the appellate court the entire record for a new trial.

The original Judiciary Act of 1879 provided for the review of equity and admiralty cases by writ of error, and under that act this court could consider only matters of law in such cases.

The act of March 3, 1803, 2 Stat. 244, now § 692, Rev. Stat., restored the old practice, and provided for the right of review in admiralty cases by appeal. Under that act this court tried the case *de novo*. *Yeaton* v. *United States*, 5 Cranch, 281; *Irvine* v. *Hesper*, 122 U. S. 256; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. Rep. 690.

Under act of February 16, 1875, 18 Stat. 315, it was held that this court was limited to questions of law as before the act of 1803. *The Abbotsford*, 98 U. S. 440; *The Francis Wright*, 105 U. S. 381.

The Circuit Court of Appeals Act of March 3, 1891, transferred appellate jurisdiction in admiralty causes to the courts of appeals and made their jurisdiction final. This part of the act has become § 128 of the Judicial Code.

The courts of appeals for the several circuits have agreed in holding that the act of 1875 was not applicable to admiralty appeals from the District Courts, but that the case is brought up for trial *de novo* in accordance with the practice in this court before 1875. *The Philadelphian*, 60 Fed. Rep. 423; *The Havilah*, 48 Fed. Rep. 684; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. Rep. 960; *The E. A. Packer*, 58 Fed. Rep. 251; *Earn Line S. S. Co.* v.

Ennis, 165 Fed. Rep. 633; *The Brandywine*, 87 Fed. Rep. 652; *City of Cleveland* v. *Chisholm*, 90 Fed. Rep. 431; *Royal Exch. Assurance* v. *Graham*, 166 Fed. Rep. 32; *Pioneer Fuel Co.* v. *McBrier*, 84 Fed. Rep. 495; *The State of California*, 49 Fed. Rep. 172; *The Bailey Gatzert*, 179 Fed. Rep. 44.

The jurisdiction of the Circuit Court of Appeals is final, and the appeal and writ of error herein must be dismissed. See § 128 of the Judicial Code.

Congress never intended to cast upon this court the burden of deciding every case of this character where the amount involved might exceed one thousand dollars.

Such has been the practical construction of this act during the six years of its enforcement. Of the thousands of suits under it but few have come to this court. Two were criminal cases, brought here by the Government under the Criminal Appeals Act of 1907, *United States* v. *Johnson*, 221 U. S. 488; *United States* v. *Morgan*, 222 U. S. 274, while a forfeiture case (*Hipolite Egg Company* v. *United States*, 220 U. S. 45, 49), was heard on a question of jurisdiction certified by the District Court; the fourth case (*United States* v. *Antikamnia Chemical Company*, No. 455, this term) arose in the District of Columbia, and the appeal is governed by other statutes.

This is the only case therefore in which it has been claimed that the decision of the Circuit Court of Appeals is not final.

The writ of error and the appeal should be dismissed.

Mr. Justice Day delivered the opinion of the court.

This case is here on both writ of error to and appeal from a decree of the Circuit Court of Appeals for the Third Circuit, reversing the judgment of the United States District Court for the District of New Jersey dismissing a libel brought by the United States which had for its object the condemnation of four hundred and forty-three

cans of frozen egg product seized under the Pure Food Act of June 30, 1906 (34 Stat. 768, c. 3915).

The United States filed its libel alleging that four hundred and forty-three cans of frozen egg product, in the possession of the Merchants' Refrigerating Company at Jersey City, New Jersey, consisted in whole or in part of a "filthy, decomposed and putrid animal, to wit, egg substance," and praying for their condemnation. At the trial the issues were narrowed so as to exclude filthy and putrid substances, leaving the charge to stand as to decomposed substance. Three hundred and forty-two cans were seized. The H. J. Keith Company appeared and claimed the goods, denying the charges concerning them. The case was tried without a jury to the District Judge, who entered a decree dismissing the libel. The United States took an appeal to the Circuit Court of Appeals, and, after consideration in that court, the decree dismissing the libel was reversed and, upon the facts, a decree of condemnation in favor of the Government was entered. 193 Fed. Rep. 589. The claimant, the H. J. Keith Company, thereupon appealed to this court, and also sued out a writ of error to the same decree.

We are met at the outset with a question of jurisdiction. Section 10 of the Pure Food Act provides:

"That any article of food . . . that is adulterated or misbranded within the meaning of this Act, and is being transported from one State . . . to another for sale, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. . . . The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

It will be observed that the last sentence of the section provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." The contention of the Government upon this question of jurisdiction is, that the words, "conform, as near as may be, to the proceedings in admiralty," mean, except in cases where jury trial is demanded, to include appellate proceedings, as well as original proceedings in the District Court, and therefore the review of the judgments of the District Court would be by appeal to the Circuit Court of Appeals, as in admiralty cases under the Circuit Court of Appeals Act (26 Stat. 826, c. 517) and under the Judicial Code (36 Stat. 1087, 1133, c. 231, § 128). If that is a proper construction of the statute, then the Circuit Court of Appeals had the right to review the case upon the facts and enter a final decree, which, under the Circuit Court of Appeals Act and Judicial Code, would be reviewable here only upon writ of certiorari.

The appellant, also plaintiff in error, contends that the seizure being upon land, the proceeding was at law and reviewable only upon writ of error in the Circuit Court of Appeals; that the attempted appeal did not give the Circuit Court of Appeals jurisdiction, and that upon the writ of error here this court should reverse the judgment and remand the case to that court with directions to dismiss the appeal.

The determination of this controversy requires some examination of previous legislation and of the decisions of this court interpreting such legislation as to the nature and extent of the jurisdiction of the District Courts of the United States in seizure cases.

The Judiciary Act of 1789 (1 Stat. 73, 76, c. 20, § 9) gave to the District Courts:

"Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and . . . also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."

In the case of *The Sarah*, 8 Wheat. 391, a libel was filed against 422 casks of wine alleging a forfeiture by false entry. It appearing in the course of the trial that the seizure was made on land, it was held that this court could not review the case save upon writ of error. Chief Justice Marshall, delivering the opinion of the court, said (p. 394):

"By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas' Rep. 297); *The Sally* (in 2 Cranch's Rep. 406) and *The Betsy and Charlotte* (in 4 Cranch's Rep. 433), that the trial is to be by the court.

"Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law."

A statute, practically the same, with some slight changes, was embodied in § 563 of the Revised Statutes,

subdivision 8, giving the District Courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction . . . and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the Judiciary Act of 1789 to which we have referred as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." Under this statute it has been uniformly held that the District Court as to seizures on land proceeds as a court of common law with trial by jury and not as a court of admiralty. *United States* v. *Winchester*, 99 U. S. 372.

Questions analogous to the one here came before this court in construing the Confiscation Acts enacted in 1861 and 1862. This court, in *Union Insurance Co.* v. *United States*, 6 Wall. 759, construed the act of Congress of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes." That act provided for the seizure of such property and its condemnation in the District or Circuit Court having jurisdiction of the amount, or in admiralty in any district in which the property might be seized, and authorized the Attorney General to institute proceedings of condemnation. In that case it was held that in the condemnation of real estate or property on land the proceedings were to be shaped in general conformity to the practice in admiralty, but in respect to trial by jury and exceptions to evidence the proceedings should conform to the course of proceeding by information on the common-law side of the court. It was held that where proceedings for the forfeiture of real estate were had in conformity with the practice in courts of admiralty they could not be reviewed in this court by appeal, and that the case could come here only for the purpose of reversing the decree and directing a new trial.

In the case of *Morris's Cotton*, 8 Wall. 507, this court

had under consideration the acts of 1861 and of July 17, 1862, which act provided (12 Stat. 589, 591, § 7) for the institution of proceedings in the name of the United States in any District Court, etc., where the property might be found, etc., "which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." In the *Morris Case* it was said (p. 511):

"Where the seizure is made on navigable waters, within the ninth section of the Judiciary Act, the case belongs to the instance side of the District Court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

"Seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burden, are exclusively cognizable in the District Courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error."

This jurisdiction of the District Court was known to Congress at the time it passed the Pure Food Act, as were the decisions of this court construing the former acts of Congress, and it declared that such proceedings shall conform to those in admiralty, as near as may be, giving to either party, however, the right to demand a trial by jury in case of issues of fact joined. We think this act must be held to have been passed not to confer a new jurisdiction upon the District Court, but in recognition of the jurisdiction already created in seizures upon land and water. The act makes no reference, in conforming the proceedings as near as may be to those in admiralty, to appellate procedure. It leaves that to be determined by the nature of the case and the statutes already in force. It is true that the right of trial by jury is preserved, where demanded

by either party. We think Congress inserted this provision with a view to removing any question as to the constitutionality of the act. It was held under the Confiscation Acts, although no such specific provision is contained, that the action provided was one at common law, with a right to trial by jury. The Seventh Amendment to the Constitution preserves the right of trial by jury in suits at common law involving more than twenty dollars, and provides that no fact tried by a jury shall be reviewed otherwise than according to the rules of the common law. Having in mind these provisions and as well the construction of the previous acts, we think it was the purpose of Congress to leave no doubt as to the right of trial by jury in the law proceeding for condemnation which the act intended to provide.

These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute as we have construed it gives the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the Circuit Court of Appeals, and, where more than one thousand dollars is involved, finally in this court (§ 6 of the Circuit Court of Appeals Act). It is to be noted in this connection that where the examination of specimens of food or drugs made by the Department of Agriculture shows that the articles are adulterated or misbranded, the parties from whom the specimens were obtained are (§ 4 of the Pure Food act) given a hearing before the matter is certified to the district attorney by the Secretary of Agriculture.

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law. It is true that, if the action is tried in the District Court without a

jury, the Circuit Court of Appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding. *Campbell* v. *United States*, 224 U. S. 99. But the party on jury trial may reserve his exceptions, take a bill of exceptions and have a review upon writ of error in the manner we have pointed out.

It is insisted for the Government that inasmuch as the hearing in the Circuit Court of Appeals upon appeal was without objection by the claimant, the jurisdictional objection was waived. We cannot take that view. As we construe the statute, the Circuit Court of Appeals had no jurisdiction upon the appeal, and neither the action of the court nor the consent of the parties could give it. *Leo Lung On* v. *United States*, 159 Fed. Rep. 125; *Jones* v. *La Vallette*, 5 Wall. 579; *United States* v. *Emholt*, 105 U. S. 414; *Perez* v. *Fernandez*, 202 U. S. 80, 100.

As the Circuit Court of Appeals, in our opinion, proceeded without jurisdiction by reason of the appeal, this court, having acquired jurisdiction, should reverse the judgment of the Circuit Court of Appeals and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71.

Judgment accordingly.

TOYOTA *v.* TERRITORY OF HAWAII.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 49. Submitted November 13, 1912.—Decided December 2, 1912.

Section 1343, Revised Laws of Hawaii, imposing a license fee of six hundred dollars for auctioneers in the district of Honolulu and fifteen dollars for each other taxation district, is not unconstitutional

as depriving an auctioneer in Honolulu of his property without due process of law or as denying him the equal protection of the laws.

On writ of error to a territorial court only such questions are before this court as can be raised upon writ of error to a state court.

What amounts to selling at auction, within the meaning of a license statute, is for the state or territorial court to determine, and presents no Federal question reviewable by this court.

It is the province of the legislature to determine upon the amount of license fees, and unless the classification is arbitrary and unreasonable it may establish different amounts for different districts.

This court will assume that the legislature of a State or Territory takes into consideration the varying conditions in respective localities in which the same business is to be conducted, and unless palpably arbitrary the classification will not be disturbed.

In view of the fact that the great bulk of the business of Hawaii is done at Honolulu this court will not declare that a license fee of six hundred dollars for auctioneers in that district is an arbitrary and unreasonable classification as against fifteen dollars for auctioneer's license in other districts of Hawaii.

19 Hawaii, 651, affirmed.

THE facts are stated in the opinion.

Mr. D. W. Burchard and *Mr. A. L. C. Atkinson* for plaintiff in error:

The power of the legislature of Hawaii under the Organic Act to license the occupation of auctioneer is conceded. Its power to do so by a law like that in question here, where auctioneers in the Territory are classified arbitrarily, with regard to locality, and with utter disregard to amount of population or amount of business done, is denied. In the case of *Trust Company* v. *Treasurer*, 19 Hawaii, 262, the Supreme Court judicially determined the numerical population of the various taxing districts, as follows: Honolulu, almost 40,000; Hilo, almost 20,000, and all others less than Hilo. The numerical population of these districts is a part of the history of the Territory, and it was the duty of the District Court and of the Supreme Court to take judicial notice of the same.

In the absence of any showing to the contrary the presumption is that these different districts so far as the occupation in question is concerned, do a volume of business proportionately to their respective population.

The statute in question imposes a burden upon the plaintiff in error and others engaged in the occupation of auctioneer in the district of Honolulu unequal to that imposed upon others engaged in the same occupation in other districts; it denies the equal protection of the law to the plaintiff in error and others engaged in auctioneering in Honolulu; it takes from the plaintiff in error his property without due process of law. *Ho Ah Kow* v. *Nuan*, Fed. Cas. No. 6546; *State* v. *Mitchell*, 97 Maine, 66; *State* v. *Shedroi*, 75 Vermont, 277; *Ex parte Deeds* (Ark.), 87 S. W. Rep. 1030; *In re Yot Sang*, 75 Fed. Rep. 983; *Re Cope's Estate*, 191 Pa. St. 1; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 704; *Ex parte Jentsch*, 112 California, 468; *Luman* v. *Hutchins Bros.*, 90 Maryland, 14; *Evansville* v. *State*, 118 Indiana, 426; *State* v. *Cadigan*, 73 Vermont, 245; *State* v. *Wiggin*, 64 N. H. 508; *Sayre* v. *Phillips*, 148 Pa. St. 482; *Hoadley* v. *Board Ins. Coms.*, 37 Florida, 564; *Rossmiller* v. *State*, 114 Wisconsin, 169; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *State* v. *Loomis*, 115 Missouri, 307; *Stratton* v. *Morris*, 89 Tennessee, 497; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Territory* v. *McDonald*, 17 Hawaii, 389; *South & North Ala. R. Co.* v. *Morris*, 65 Alabama, 193; *Chicago, St. L. &c. R. Co.* v. *Moss*, 60 Mississippi, 641; *St. Louis &c. R. Co.* v. *Williams*, 49 Arkansas, 492; *Jollife* v. *Brown*, 14 Washington, 155; *Grand Rapids Chair Co.* v. *Runnels*, 77 Michigan, 104; *San Antonio & A. P. R. Co.* v. *Wilson*, 19 S. W. Rep. 910; *Atchison & N. R. Co.* v. *Baty*, 6 Nebraska, 37; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *San Mateo* v. *Southern Pac. R. Co.*, 13 Fed. Rep. 722; *Santa Clara* v. *Southern Pac. R. Co.*, 118 U. S. 394; *Territory* v. *Pottie*,

19 Hawaii, 99; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Seaboard A. & R. Co.* v. *Simmon*, 47 So. Rep. 1001; *Off* v. *Morehead*, 235 Illinois, 40; Cooley, Const. Lim. (4th ed.), p. 744; Cooley on Taxation (2d ed.), 169.

The statute, because of its discriminating nature, the imposition by it of burdens upon some which are not placed upon others, violates the letter and spirit of § 55 of the Organic Act creating the Territory of Hawaii, in that it exempts individuals outside of Honolulu from a burden placed upon the residents of Honolulu.

The stipulated facts do not show a public auction within the purview of the statute.

The language of the statute contemplates a public auction. The word "public" is not used in § 1343, nor in § 1344, but § 1345 prescribes a bond to the effect that the auctioneer "will not sell goods," etc., "except at public auction." The statute being penal must be strictly construed. Wharton's Crim. Law (10th ed.), § 28; Clark's Crim. Law (2d ed.), p. 31.

The legislature intended by the word "auction" in the statute a "public" auction or one made in the usual way. See Black's Law Dictionary for definition of the word "auction"; Bateman on Auctions, pp. 1, 2.

The stipulated facts show that the sale of fish was not to the highest bidder, but that the bids were confined to one class of persons, namely, the retail dealers in fish, and that the general public were excluded. See 1 Greenleaf on Evidence, § 128, as to word "public."

The license is forty times as great as in Hilo and other districts within the Territory of Hawaii, and violates the Fifth Amendment to the Constitution in that it takes from such person his property without due process of law, and violates the Fourteenth Amendment in that it makes an arbitrary classification and discriminates between persons engaged in the same occupation in the Territory

of Hawaii, and denies to the plaintiff in error the equal protection of the law.

Mr. Alexander Lindsay, Jr., Attorney General of Hawaii, *Mr. Charles R. Hemenway* and *Mr. E. W. Sutton*, Deputy Attorney General, for defendant in error:

The Hawaiian law requiring a higher license fee for auctioneers in the district of Honolulu than in other taxation districts of the Territory does not constitute arbitrary discrimination and is not contrary to the equal protection clause of the Fourteenth Amendment to the Constitution.

The guarantee of equal protection contained in the Fourteenth Amendment has been considered so many times by our courts that there can be no doubt as to the limitations which it places upon the power of the States. The Amendment was designed to prevent laws discriminating against some and favoring others of the same class—arbitrary and unreasonable discriminations. It was not designed to prohibit the States from enacting laws which classify the objects of taxation so long as the classification is reasonable and all persons within the class are treated alike. Nor was it designed to prevent a State from diversifying its legislation in this regard to meet diversities in situations and conditions within its borders. Cooley, Constitutional Limitations (6th ed.), 479–481; *Giozza* v. *Tiernan*, 148 U. S. 657, 661; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Barbier* v. *Connolly*, 113 U. S. 27; *State* v. *O'Hara*, 36 La. Ann. 93; *State* v. *Schlier*, 50 Tennessee, 242; *O'Hara* v. *State*, 121 Alabama, 28; *Texas Banking Co.* v. *State*, 42 Texas, 636; *East St. Louis* v. *Wehrung*, 56 Illinois, 592; *Cargill Company* v. *Minnesota*, 180 U. S. 452; *Heath & Milligan* v. *Worst*, 207 U. S. 338, 354; *Bachtel* v. *Wilson*, 204 U. S. 36; *Bell's Gap Ry.* v. *Pennsylvania*, 134 U. S. 232; *Strange* v.

Commissioners, 91 N. E. Rep. 242 (Ind.); *State* v. *Mitchell*, 97 Maine, 66, 70; *Missouri* v. *Lewis*, 101 U. S. 22.

Judged from the principles enunciated in these cases, the Hawaiian statute requiring a higher license fee for auctioneers in Honolulu than elsewhere is clearly constitutional, for the difference in license fees is based upon a difference not only in population, but in the amount of business transacted in the different places. *Trust Company* v. *Treasurer*, 19 Hawaii, 262.

It is not sufficient ground for holding such a statute unconstitutional that it may possibly be arbitrary and unreasonable, but it must be as a matter of fact actually arbitrary and unreasonable. *Heath & Milligan* v. *Worst*, 207 U. S. 338; *Bachtel* v. *Wilson*, 204 U. S. 36; *Trust Co.* v. *Treasurer*, 19 Hawaii, 262; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251; *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S. 283; *Hayes* v. *Missouri*, 120 U. S. 68; *Missouri* v. *Lewis*, 101 U. S. 22; *Clark* v. *Kansas City*, 176 U. S. 114, 119.

The classification made by the act in question is reasonable and based upon differences in conditions which justify it, and consequently the act is not in conflict with the Fourteenth Amendment.

With regard to decisions of territorial courts, the rule is that this court "will lean toward the interpretation" of the territorial court. The Supreme Court of Hawaii having construed the law with regard to auctioneers and having reached the conclusion that the sale conducted by this defendant was within the meaning of the Hawaiian statute, and this construction not involving any Federal question, this court will consider the decision upon those points as having great weight if not decisive. *Missouri, K. & T. R. Co.* v. *McCann & Smizer*, 174 U. S. 580, 586; *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S. 142, 152; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 132 U. S. 418, 456; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174

U. S. 97; *Dower* v. *Richards*, 151 U. S. 658, 672; *Egan* v. *Hart*, 165 U. S. 193; *Copper Queen Consol. Min. Co.* v. *Arizona*, 206 U. S. 474, 479; *Kealoha* v. *Castle*, 210 U. S. 149, 154.

The sale conducted by Toyota was an auction within the meaning of the Hawaiian statute.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error was convicted in the District Court of Honolulu, Hawaii, of the offense of selling goods at auction, in Honolulu, without an auctioneer's license, and was sentenced to pay a fine of six hundred dollars and costs. The Supreme Court affirmed the conviction and the case comes here on error.

In order to obtain a license for auction sales it was necessary to pay the fee prescribed by § 1343 of the Revised Laws of the Territory of Hawaii, which provides:

"The annual fee for a license to sell goods, wares and merchandise or other property at auction, shall be six hundred dollars for the district of Honolulu, and fifteen dollars for each other taxation district."

An agreed statement of facts showed that the plaintiff in error was the agent of the corporation known as the "Hawaiian Fisheries, Limited," which handled fish daily for a large number of fishermen. The catch was brought to the market in Honolulu, where the plaintiff in error offered it in basket lots, each basket containing from 70 to 100 pounds, to the retail dealers of fish only, the one bidding the highest price becoming the purchaser.

The plaintiff in error contended in the territorial court that he did not sell at auction within the meaning of the statute, and further, that the statute, if it was applicable, denied to him the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States because of the discrimination between the

district of Honolulu and other districts in the amount of the license fees imposed.

The Supreme Court of Hawaii assumed, as the plaintiff in error argues, that the word "auction" in § 1343 means public auction. This conclusion was reached in the light of the requirement of § 1345 that the bond to be given by the person receiving the license should contain a provision that he will not sell "except at public auction"; and the court ruled that the sales conducted by the plaintiff in error were sales at public auction within the contemplation of the statute although bids were accepted only from the retail dealers or the persons conducting fish tables at the market. This ruling presents no Federal question and hence is not reviewable here, as only such questions are before us upon this writ of error as could be raised upon a writ of error to a state court. Act of April 30, 1900, c. 339, § 86, 31 Stat. 141, 158; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 309; *Notley* v. *Brown*, 208 U. S. 429, 440. In view of the amount involved, the case cannot in any view come within the amendment made by the act of March 3, 1905, c. 1465, § 3, 33 Stat. 1035; *Honolulu Transit Co.* v. *Wilder*, 211 U. S. 144.

The remaining contention, urged in various forms by the assignments of error, comes to the single point that the statute created an arbitrary classification. It cannot be said, however, that there was no reasonable basis for a distinction between Honolulu and other districts. And it was the province of the legislature to decide upon the amount of the fees which should be charged. It must be assumed that in so deciding it took into account varying conditions in the respective localities, as, for example, in the amount of business transacted and in the corresponding value of such licenses. Necessarily, as was said in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 294, the power of classification "must have a wide range of discretion." It is not reviewable "unless pal-

pably arbitrary." *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52–55; *Engel* v. *O'Malley*, 219 U. S. 128; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235. With its intimate knowledge of local conditions, the Supreme Court of the Territory said upon this point: "The great bulk of the business of the Territory is done in Honolulu. It is not for us to say whether we would make the difference in the amount of license fees in this case as large as the legislature has made it. It is sufficient that we cannot say that the difference is unreasonable or that the statute is unequal or arbitrary in its operation." We find no ground for a different conclusion.

Judgment affirmed.

PURITY EXTRACT AND TONIC COMPANY *v.* LYNCH.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 464. Submitted October 28, 1912.—Decided December 2, 1912.

The decision by the state court that an article is within the prohibition of a state statute is binding here.

The protection accorded by the Federal Constitution to interstate commerce does not extend beyond the sale in original packages as imported; and a contract made in one State for delivery of liquor in another State which does not limit the sale in the latter State to original packages encounters the local statute and cannot be enforced if contrary thereto.

Where there have been no purchases and no deliveries under a contract for delivery of liquor, but the vendee has given notice of refusal to accept because the contract is illegal in the State of delivery, the state court, in sustaining the illegality of the contract, does not deny the seller the right to sell the article or have it transported in interstate commerce.

Where a large number of bottles, each in a separate box, are all contained in one case, each bottle is not to be regarded as a separate original package and protected from interference by state statute under the commerce clause of the Constitution; and this even if the contract of shipment declared there was to be no retail sale by the consignee.

Quære, and not decided, whether an article such as Poinsetta, the beverage involved in this case, having a low percentage of malt, is governed by the Wilson Act.

A State may, in the exercise of its police power, prohibit the sale of intoxicating liquor, and to the end of making the prohibition effectual may include in the prohibition beverages which separately considered may be innocuous; and so held as to Poinsetta, a beverage containing a small percentage of malt.

The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, cannot declare that the limit of legislative power has been transcended.

For the courts to attempt to determine whether the exercise of the police power within legislative limits is wise would be contrary to our constitutional system and substitute judicial opinion for the legislative will. The only question in this court is whether the legislature had the power to establish the regulation.

The legislation to that effect in many of the States shows that the opinion is extensively held that a general prohibition of sale of malt liquors whether intoxicating or not is necessary to suppress the sale of intoxicants.

In the exercise of its police power to prohibit the sale of intoxicants a State may include within the prohibition malt and other liquors sold under the guise of innocent beverages.

100 Mississippi, 650, affirmed.

THE facts, which involve the constitutionality of a statute of Mississippi which includes the prohibition of the sale of malt liquors, are stated in the opinion.

Mr. Marcellus Green, Mr. George B. Lancaster, Mr. G. W. Green and *Mr. Marcellus Green, Jr.*, for plaintiffs in error:

Chapter 113, § 1, as interpreted by the Supreme Court of the State of Mississippi in so far as it regulates the

movement of Poinsetta in interstate commerce, violates the Federal Constitution. *Leisy* v. *Hardin*, 135 U. S. 100; *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465; *In re Rahrer*, 140 U. S. 35; *Brennan* v. *Titusville*, 153 U. S. 289; *Scott* v. *Donald*, 165 U. S. 95; *Vance* v. *Vandercock*, 170 U. S. 441; *Rhodes* v. *Iowa*, 170 U. S. 411; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Telegraph Co.* v. *Philadelphia*, 190 U. S. 162; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Brewing Co.* v. *Crenshaw*, 198 U. S. 21; *Cook* v. *Marshall County*, 196 U. S. 261; *Foppiano* v. *Speed*, 199 U. S. 504; *South Carolina* v. *United States*, 199 U. S. 461; *Rearick* v. *Pennsylvania*, 203 U. S. 508; *Express Co.* v. *Kentucky*, 214 U. S. 218; *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S. 81.

Said statute as interpreted by the Supreme Court of the State of Mississippi, in so far as it deprives plaintiff in error of the right to sell Poinsetta, is in conflict with the Fourteenth Amendment in that thereby it attempts to deprive plaintiff in error of its property and liberty without due process of law. *Lochner* v. *New York*, 198 U. S. 56; *Harper* v. *California*, 155 U. S. 662; *Hudson Water Co.* v. *McCarter*, 209 U. S. 355; *Welch* v. *Swasey*, 214 U. S. 103.

The cases cited by defendant in error can all be distinguished.

Mr. Edward Mayes, *Mr. Robert B. Mayes* and *Mr. Jas. R. M'Dowell*, for defendant in error.

The record shows that Poinsetta, though not intoxicating, and containing no alcohol, is a malt product and contains 5.73 per cent. of malt out of 9.55 per cent. of solid matter, the balance being water. Poinsetta is sold as a beverage and, as such, it is a malt liquor within the meaning of the prohibition statute of Mississippi. The fact that the statute enumerates malt liquor as one of those prohibited, brings Poinsetta within its terms, and it makes

no difference whether it is alcoholic or intoxicating or not. *Fuller* v. *Jackson*, 52 So. Rep. 876; *Reyfelt* v. *State*, 73 Mississippi, 415; *Edwards* v. *Gulfport*, 49 So. Rep. 620; *Elder* v. *State*, 50 So. Rep. 370.

The statute prohibits the sale of malt liquors and that is conclusive. In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary in the opinion of the legislature to make effective the police regulation. *Pennell* v. *State*, 113 N. W. Rep. 115; *Marks Case* (Ala.), 48 So. Rep. 864; *United States* v. *Cohn*, 52 S. W. Rep. 38.

Poinsetta is a malt liquor and is therefore prohibited, regardless of intoxicating properties. If the liquor sold was a malt liquor, it is not necessary for a jury to determine whether it was or was not intoxicating in fact. *State* v. *O'Connell*, 50 Atl. Rep. 59; *Guilbert* v. *Kauffman*, 67 N. E. Rep. 1062; *Lemly* v. *State*, 20 L. R. A. (O. S.) 645; *Netso* v. *State*, 1 L. R. A. 825; *Commonwealth* v. *Fowler*, 33 L. R. A. (O. S.) 839; *State* v. *Fargo Bottling Works*, 26 L. R. A. (N. S.) 872.

The State, in the exercise of its police powers, has an undoubted right to take into consideration not only the effect of the article sold upon the life and health of the individual, but also the fact that it may be used readily and conveniently as a cover to violations of the law. *Luther* v. *State*, 20 L. R. A. (N. S.) 1146; *Lawrence* v. *Monroe*, 10 L. R. A. 520; *State* v. *Frederickson*, 6 L. R. A. (N. S.) 186; *State* v. *O'Connell* (Me.), 58 Atl. Rep. 59; *Feibelman* v. *State* (Ala.), 30 So. Rep. 384. See also Black on Intoxicating Liquors, § 43; *In re Spickler*, 43 Fed. Rep. 653; *State* v. *York*, 74 N. H. 125; *State* v. *Fredrickson*, 115 Am. St. Rep. 295; *State* v. *Conner*, 99 Maine, 61; *United States* v. *Ducourneau*, 54 Fed. Rep. 138.

Even if Poinsetta cannot be used as a subterfuge for beer because it is distinctive in taste, color and odor and has the name blown in the bottle, yet it may be used as a substitute; being a malt drink it may gratify the craving for malt liquors or it may lead to the creation of a desire for malt liquors. *Walker* v. *Dailey*, 101 Ill. App. 575; *Holcomb* v. *State*, 49 Ill. App. 73; *Caldwell* v. *State*, 112 Georgia, 135; *Campbell* v. *Thomasville*, 64 S. E. Rep. 814; *State* v. *Auditor*, 68 Oh. St. 635; *Smith* v. *State*, 49 So. Rep. 115.

The State has not exceeded its police powers in prohibiting the sale of malt liquors which are non-intoxicating, and the act does not violate the due process clause of the Fourteenth Amendment. *Chicago, B. & Q. R.* v. *McGuire*, 219 U. S. 549.

In determining whether or not a State has exceeded its police powers this court will never overthrow a statute of a State unless the action of the legislature was arbitrary and had no reasonable relation to a purpose which it was competent for the Government to effect. *Otis* v. *Parker*, 187 U. S. 606; *Ah Sin* v. *Wittman*, 198 U. S. 509; *Lemieux* v. *Young*, 211 U. S. 489; *Kidd et al.* v. *Musselman*, 217 U. S. 461; *Booth* v. *Illinois*, 184 U. S. 425.

A statute which can confiscate property rights and destroy business must be justifiable upon the suggested reasons of public benefit; but whether justifiable or not, are reasons that address themselves exclusively to legislative wisdom. Cooley, Const. Lim. (7th ed.), 150 and 849; Black on Intoxicating Liquors, § 34; *Lawrence* v. *Monroe* (Kansas), 10 L. R. A. 520.

In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. *Pennell* v. *State*, 141 Wisconsin, 35;

Booth v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *State ex rel.* v. *Aiken*, 26 L. R. A. 345; *Stone* v. *Mississippi*, 101 U. S. 814; *Mugler* v. *Kansas*, 123 U. S. 660; *Barbier* v. *Connolly*, 113 U. S. 27.

Lochner v. *New York*, 198 U. S. 56; *Hooper* v. *California*, 155 U. S. 662; *Powell Case*, 127 U. S. 678; *Dobbins* v. *Los Angeles*, 195 U. S. 224, all present entirely different cases and do not sustain the contention of plaintiff in error.

The question of interstate commerce is not involved. The Wilson Act is not necessarily involved in this litigation, for the reason that no attempt has been made to bring this beverage into the State.

The container, or box in which these bottles are packed, and not the single bottle itself is the original package. 17 A. and E. Enc. Law (2d ed.), 294; Black on Intoxicating Liquors, § 75; *Harrison* v. *State*, 10 So. Rep. 30; *Keith* v. *State*, 8 So. Rep. 353; *Cook* v. *Marshall Co.*, 196 U. S. 261.

Mr. Justice Hughes delivered the opinion of the court.

This is an action for breach of contract. The Purity Extract and Tonic Company (plaintiff below), a Tennessee corporation, is the manufacturer of a beverage called "Poinsetta," and in November, 1910, it made an agreement with the defendant Lynch for the purchase of the article by him on stated terms during the period of five years. The agreement contemplated resales by the defendant in Hinds County, Mississippi, to the making of which he was to devote his best efforts. It was provided that he was to sell only in that county where he was to have the exclusive right of sale for which he was to pay to the plaintiff the sum of five hundred dollars within five days after the making of the contract. It was to recover this amount that the action was brought, the defendant having repudiated the agreement at the outset

upon the ground that on coming to Mississippi he found it to be unlawful to sell "Poinsetta" in that State. The trial court sustained the defense of illegality and its judgment was affirmed by the Supreme Court of Mississippi. 100 Mississippi, 650.

The statute which the agreement has been held to violate is Chapter 115 of the Laws of Mississippi of 1908, § 1, p. 116, which includes in its prohibition the sale of malt liquors.

The case was tried upon an agreed statement of facts in which the characteristics of "Poinsetta" are set forth at length. In substance, the statement is that it is composed of pure distilled water to the extent of 90.45 per cent., the remaining 9.55 per cent. being solids derived from cereals, "which are in an unfermented state and are wholesome and nutritious"; that "it contains 5.73% of malt and is sold as a beverage"; that it does not contain either alcohol or saccharine matter, being manufactured in such a manner under a secret formula obtained from German scientists as to bring neither into its composition; that it is not intoxicating; that its taste and odor are distinctive; that its appearance is such that "it would not probably be mistaken for any intoxicating liquor"; and that it "cannot be employed as a subterfuge for the sale of beer because it is bottled in a distinctive way and its name blown in each bottle which contains the beverage." It is further agreed that "the United States Government does not treat Poinsetta as within the class of intoxicating liquors and does not require anything to be done with reference to its sale."

The state court, following its decision in *Fuller* v. *City of Jackson*, 97 Mississippi, 237, construed the statute as prohibiting the sale of all malt liquors whether in fact intoxicating or not, and this construction of the state law is binding here. The court said: "Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such

is prohibited from being sold in this State. The prohibition law can not be made effective unless it excludes all subterfuges." (100 Mississippi, 650, 657.)

The agreed statement of facts also contained the following: "Poinsetta is put up in bottles at Chattanooga, Tennessee, and is shipped in bottles, each separate and apart from the other, placed in a case to which they are in no way attached, and which is done merely to prevent breakage of the bottles in transit. The case is not fastened with nails or other device but merely closed. The bottles so contained are shipped in interstate commerce from Chattanooga, Tennessee, and are to be received under the contract by the consignee in Mississippi in the same condition as when bottled, and are to be sold as each several package. There is to be no retail sale under such right by said Lynch in the State of Mississippi, but all shipments are to be made direct either to said Lynch, or to other persons who shall desire to purchase said drink, and are to be delivered to said purchasers of said bottles in precisely the same shape as prepared in Tennessee, and said Poinsetta is still contained in the original package at the time it will be offered for sale in Mississippi by the purchaser thereof in the original package which was sent from Tennessee through Alabama into Mississippi."

The plaintiff brings this writ of error assailing the validity of the statute, as construed by the state court, (1) as an unconstitutional interference with interstate commerce and (2) as depriving the plaintiff of its liberty and property without due process of law.

First. We do not find that the decision of the state court involves a denial of any right incident to interstate commerce. The contract, it is true, provided for purchases by the defendant from the plaintiff, the deliveries to be made at Chattanooga, Tennessee, for transportat on to the defendant at Jackson, Mississippi. So far as appears, however, there were no purchases and no deliveries. The

reason obviously is that the agreement looked to resales by the defendant in Hinds County. Finding that such sales would be against the local law, he refused performance *in limine*. The state court did not deny to the plaintiff the right to sell to the defendant or to have its article transported and delivered to the defendant in interstate commerce. *Rhodes* v. *Iowa*, 170 U. S. 412; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82. It had no such question before it. This suit was brought to recover the amount which the defendant promised to pay for the exclusive right of making sales in Hinds County. In this aspect, the validity of the contract under the state law was to be judged by its provisions for sales within the State. The contract contained no suggestion that these sales were to be limited to those made in the original packages imported. Its provisions were broad enough to include other sales and hence encountered the local statute as applied to transactions outside the protection accorded by the Federal Constitution to interstate commerce.

Nor is the contention of the plaintiff aided by the agreed statement of facts. This statement in one of its clauses says that there was to be "no retail sale" by the defendant. Whatever this may mean in the light of the words of the contract which contained no such limitation, it is clear that the defendant was not debarred from selling the bottles separately. On the contrary, the argument for the plaintiff is that "each bottle," brought into the State in cases as described, constitutes "an original package." As to this, it is to be noted that by the terms of the contract the agreed prices on the purchases by the defendant from the plaintiff were per cask containing ten dozen bottles and per case containing six dozen bottles respectively. In short, the plain purpose was that the defendant was to buy in casks and cases, and in the light of the transactions thus contemplated, and, as they would

be normally conducted, between the plaintiff as manufacturer and the defendant as local dealer it can not be said that each separate bottle which he might sell in Hinds County must be considered as an original package so as to save the sale from the interdiction of the state law. *May* v. *New Orleans*, 178 U. S. 496; *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *Marshall County*, 196 U. S. 261. We are, therefore, not called upon to consider whether or not the Wilson Act (August 8, 1890, c. 728; 26 Stat. 313) governs in the case of such an article as "Poinsetta" and, confining ourselves to the issue presented, we express no opinion upon that point.

Second. Treating the matter then as one of local sales, the question is whether the prohibitory law of the State as applied to a beverage of this sort is in conflict with the Fourteenth Amendment.

That the State in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Boston Beer Company* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1; *Crowley* v. *Christensen*, 137 U. S. 86. It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *Ah Sin* v. *Wittman*, 198 U. S. 500, 504; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31; *Murphy* v. *California*, 225 U. S. 623. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that

the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system.

Thus in *Booth* v. *Illinois*, *supra*, the defendant was convicted under a statute of that State which made it a criminal offense to give an option to buy grain at a future time. It was contended that the statute as interpreted by the state court was "not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling." The argument was that it directly forbade the citizen "from pursuing a calling which, in itself, involves no element of immorality." This court, in sustaining the judgment of conviction, said: "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." It must be assumed, it was added, that, "the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time," and the court could not say that the means employed were not appropriate to the end which it was competent for the State to accomplish. (*Id.* pp. 429, 430.)

The same principle was applied in *Otis* v. *Parker*, *supra*,

which dealt with the provision of the constitution of California that all contracts for the sale of shares of the capital stock of any corporation, on margin, or to be delivered at a future day, should be void, and that any money paid on such contracts might be recovered. The objection urged against the provision in its literal sense was that the prohibition of all sales on margin bore no reasonable relation to the evil sought to be cured, but the court upheld the law, being unwilling to declare that the deep-seated conviction on the part of the people concerned as to what was required to effect the purpose could be regarded as wholly without foundation. (*Id.*, pp. 609, 610.)

A strong illustration of the extent of the power of the State is found in *Silz* v. *Hesterberg*, 211 U. S. 31. The State of New York by its Forest, Fish and Game Law prohibited the possession of certain game during the close season. The statute covered game coming from without the State. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the State; that these game birds were varieties different from those known as plover and grouse in the State of New York; that, although of the same families, in form, size, color and markings they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. This court affirmed the conviction, saying (p. 40): "It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the State is authorized to pass measures for the protection of the

people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted." It was pointed out that the prohibition in question had been found to be expedient in several States "owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country."

It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "malt liquors." In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other States and the decision of the courts in its construction. *State* v. *O'Connell*, 99 Maine, 61; 58 Atl. Rep. 59; *State* v. *Jenkins*, 64 N. H. 375; *State* v. *York*, 74 N. H. 125, 127; *State ex rel. Guilbert* v. *Kauffman*, 68 Oh.

St. 635; 67 N. E. Rep. 1062; *Luther* v. *State* (Nebraska), 20 L. R. A. (N. S.) 1146; *Pennell* v. *State*, 141 Wisconsin, 35; 123 N. W. Rep. 115. We cannot say that there is no basis for this widespread conviction.

The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power.

Judgment affirmed.

BUCK STOVE AND RANGE CO. *v.* VICKERS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 10. Argued December 19, 1911.—Decided December 2, 1912.

Rev. Stat., § 1011, providing that there shall be no reversal in this court upon a writ of error for error in ruling on any plea of abatement other than one to the jurisdiction of the court, does not apply to writs of error to state courts but only to lower Federal courts.

The subdivision and rearrangement of § 22 of the Judiciary Act of 1789 in the Revised Statutes of 1873 did not work any change in the purpose and meaning of the original act.

The statute of Kansas of 1905, requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce, under the commerce clause of the Federal Constitution. *International Textbook Company* v. *Pigg*, 217 U. S. 91.

80 Kansas, 29, reversed.

THE facts, which involve the application of § 1011, Rev. Stat., to writs of error to state courts and also the constitutionality of a statute of Kansas affecting the right

of corporations of other States to do business in Kansas, are stated in the opinion.

Mr. Seneca N. Taylor and *Mr. Malcolm B. Nicholson*, with whom *Mr. William J. Pirtle* was on the brief, for plaintiffs in error:

There is no misjoinder of plaintiffs in error. *Kansas City* v. *King*, 65 Kansas, 65.

Plaintiffs in error having been engaged exclusively in interstate commerce, the application of the corporation laws of Kansas to them is repugnant to the interstate commerce clause of the Constitution of the United States, and such application cannot lawfully be made. *Cooper Mfg. Co.* v. *Ferguson and Harrison*, 113 U. S. 727.

Plaintiffs in error were entitled to bring and maintain these suits in the courts of the State of Kansas upon the same terms and upon the same footing as an individual citizen of the States of their creation, and of which these corporations were citizens, under § 2, Art. IV of the Constitution of the United States. 133 U. S. 107.

The manner of these people in dealing with the citizens of Kansas is interstate commerce. *Stockard* v. *Morgan*, 185 U. S. 27; *Brown* v. *Maryland*, 12 Wheat. 419; *Welton* v. *Missouri*, 91 U. S. 275; *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489; 1 I. C. C. Rep. 45.

State statutes requiring foreign corporations to comply with certain conditions before doing business in the State have frequently been held inapplicable to a foreign corporation whose only business in the State is selling through traveling agents and delivering goods manufactured outside of the State, since any other construction of the statute would render it void as an interference with interstate commerce. *Havens & G. Co.* v. *Diamond*, 93 Ill. App. 557; *Coit & Co.* v. *Sutton*, 102 Michigan, 324; 25 L. R. A. 819; 4 I. C. C. Rep. 768; *Toledo Com. Co.* v. *Glen Mfg. Co.*, 55 Oh. St. 217; *Mearshon* v. *Pottsville*

Lumber Co., 187 Pac. Rep. 12; *Bateman* v. *Western Star Mill Co.*, 1 Tex. Civ. App. 90; 4 I. C. C. Rep. 260; 20 S. W. Rep. 931; *Davis & R. Bldg. & Mfg. Co.* v. *Dix*, 64 Fed. Rep. 406; *Woessner* v. *Cottam & Co.*, 19 Tex. Civ. App. 611; also *City of Ft. Scott* v. *Pelton*, 39 Kansas, 764; and see *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650.

Plaintiffs in error had a vested right to maintain and prosecute the suits to judgment.

The judgments upon which these suits were founded were obtained in November, 1895, and these suits were commenced June 13, 1896. Chapter 10 of the laws passed by the special session, 1898, became effective on January 11, 1899, two years and six months after these suits were commenced.

Before the passage of that law the courts of the State were open to all corporations alike, foreign and domestic, and no restrictions of any kind placed upon foreign corporations to come into the courts of the State of Kansas and seek their remedy against any of its citizens.

It is not within the power of the legislature to deprive these plaintiffs of the remedy by casting a pecuniary burden upon them.

Plaintiffs in error, having commenced the suits long prior to the enactment of the law in question, had a vested right to maintain such suits and prosecute them to judgment, and were protected in such right by § 10, Art. I, of the Constitution of the United States, prohibiting the States from passing any law impairing the obligation of contracts. This court has repeatedly decided that the remedy is a part of the contract, and any legislative act that deprives a party of a remedy is repugnant to the provisions of said § 10. *Osborn* v. *Nicholson*, 13 Wall. 654; *Fitzgerald* v. *Weidenbeck*, 76 Fed. Rep. 695; *Martindale* v. *Moore*, 3 Blackf. (Ind.) 275; *Root* v. *Sweeney*, 12 S. Dak. 43; *S. C.*, 80 N. W. Rep. 149; also see *Elston* v.

Piggott, 94 Indiana, 14; *Maguiar* v. *Henry*, 84 Kentucky, 1; 7 Ky. L. Rep. 695; 4 Am. St. Rep. 182; and *Yeatman* v. *Day*, 79 Kentucky, 186; 8 Cyc. 932; *Williams* v. *Bruffy*, 96 U. S. 176; *Westerly Waterworks* v. *Westerly*, 75 Fed. Rep. 181.

In this respect corporations are no different from individuals. *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Missouri Railway Co.* v. *Patrick*, 127 U. S. 205; *Santa Clara County* v. *Pennsylvania*, 125 U. S. 181.

The Kansas courts construed the law in this case as retrospective, which is contrary to all rules of construction in respect to laws not specifically stating that they are retrospective. *Auffm'ordt* v. *Rasin*, 102 U. S. 623; *Gunn* v. *Barry*, 15 Wall. 624; *Bartruff* v. *Remey*, 15 Iowa, 257.

Mr. Stephen H. Allen, with whom *Mr. Robert Stone* was on the brief, for defendants in error:

There are no assignments of error which the court can consider.

The only decision of the Supreme Court of Kansas presented by the record is its ruling on a plea in abatement, which this court is denied the power to review or reverse. Section 1011, Rev. Stat., U. S.

There was no decision on the merits of this case adverse to the plaintiffs in error. Their suit was abated and dismissed. 1 Enc. of Pl. & Pr. 1.

Plaintiff's cause of action is not taken away, but may be asserted in any other court having jurisdiction, or in the same court after compliance with the law. *State* v. *Book Co.*, 69 Kansas, 1; *Hamilton* v. *Reeves & Co.*, 69 Kansas, 844; *Ryan Live-Stock & F. Co.* v. *Kelly*, 71 Kansas, 874.

The construction given to the statute in the foregoing cases has been steadily adhered to and is the settled law of the State. *Vickers* v. *Buck*, 70 Kansas, 584, 586; § 395, Code of Civ. Pro. of Kansas, Ch. 95, Gen. Stat. of 1909.

A judgment or decree to be final, within the meaning of that term as used in the act of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *Benjamin* v. *Dubois*, 118 U. S. 46; *Harrington* v. *Holler*, 111 U. S. 796; *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Glencoe Granite Co.* v. *City Trust, S. D. & S. Co.*, 55 C. C. A. 212.

The prohibition to sue in the courts of the State has no application to the Federal courts sitting within the State. *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. Rep. 893.

This court has always recognized and enforced the limitation placed on its power by § 1011, no matter how important or meritorious the claim of error might appear. *Robertson* v. *Coulter*, 16 How. 106; *Stephens* v. *Monongahela Bank*, 111 U. S. 197. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, in which the constitutionality of the statute under which this case was dismissed was considered, is not an authority on the point now under consideration, because it was not raised or discussed.

A judgment for the costs which had accrued in the fruitless action does not amount to a final judgment which will support the jurisdiction of this court. *Trustees* v. *Greenough*, 105 U. S. 527; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; 13 Am. & Eng. Ency. of Law, 34.

No Federal question is presented as to any plaintiff in error.

The terms on which a foreign corporation may exercise corporate powers within any State may be fixed by such State in its discretion and without being subject to any supervision or control by Federal authority The statute under consideration, as construed by the Supreme Court of the State, does not render contracts made by foreign corporations with citizens of the State void, where the corporation fails to comply with the law, nor does it ab-

solutely deny a remedy in the courts of the State. *Jordan* v. *Telegraph Co.*, 69 Kansas, 140. The facts in which the decision of the Supreme Court of Kansas was based are not open to question in this court. *Chapman & Dewey Land Co.* v. *Bigelow*, 206 U. S. 41; *Thayer* v. *Spratt*, 189 U. S. 346; *Gleason* v. *White*, 109 U. S. 854; *Israel* v. *Arthur*, 152 U. S. 355; *Eau Claire Natl. Bank* v. *Jackman*, 204 U. S. 522; *Dower* v. *Richards*, 151 U. S. 658.

The scope and meaning of a state statute, as determined by the highest court of the State, conclude this court in determining on writ of error to the state court whether or not such statute violates the Federal Constitution. *Smiley* v. *Kansas*, 196 U. S. 447; *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115; *Tampa Waterworks Co.* v. *Tampa*, 199 U. S. 241; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Horn Silver Mining Co* v. *State of New York*, 143 U. S. 305.

The question here presented is as to the right of a foreign corporation to prosecute an action for a tort in a court of the State of Kansas. That right has been denied, and the reason for its denial is that the plaintiffs have refused to comply with a police requirement now almost universally found in the legislation of the States. Interstate commerce is not primarily or secondarily affected by the decision under consideration.

A corporation is not a citizen within the meaning of the privilege and immunity provision. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Blake* v. *McClung*, 172 U. S. 239.

The right of a foreign corporation to exercise its corporate powers within a State other than that of its creation depends solely upon the will of such other State. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Same* v. *Texas*, 212 U. S. 112; *People* v. *Roberts*, 171 U. S. 658.

As to the merits, the legislature of Kansas has power to exclude a foreign corporation from using its courts for the

enforcement of claims which do not arise out of interstate commerce, or of any contract with or obligation to the United States, or act or duty under its authority. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Hooper* v. *California*, 155 U. S. 648; *Norfolk & Western Railroad* v. *Pennsylvania* 136 U. S. 114, 118.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, involved questions widely different from that presented in the case now before the court, for here there is neither a question of taxation of acquired property rights, or of exclusion from the transaction of business.

The statute has no special reference to commerce, much less to interstate commerce. It was not passed to regulate commerce, but to make certain information as to the affairs of corporations available to the citizens. The penalty imposed for failure to furnish that information is a temporary suspension of the right to exercise, not all, but one corporate function, that of suing in a court of the State, during the period of delinquency. The act deals exclusively with the exercise of corporate powers, a subject over which the power of the legislature is absolute. *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *People* v. *Roberts*, 171 U. S. 658; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 257.

Mr. Justice Van Devanter delivered the opinion of the court.

By suits begun in the District Court of Morris County, Kansas, and consolidated for purposes of trial and judgment, seven judgment creditors of one Vickers sought to set aside, as fraudulent, a conveyance by him and to

subject the land included therein to the satisfaction of their several judgments. The plaintiffs were corporations organized under the laws of States other than Kansas, and four of them were doing a purely interstate business in that State, but without complying with its laws presently to be mentioned. The defendants set up this non-compliance by an answer in the nature of a plea in abatement, and the court sustained the plea and dismissed the suits as to the four plaintiffs. As to the other three plaintiffs, relief was denied for other reasons, which need not be stated. The judgment was affirmed by the Supreme Court of the State, against the contention that the laws of Kansas under which the plea in abatement was sustained are violative of the commerce clause of the Constitution of the United States, 80 Kansas, 29, and then the case was brought here.

Some minor questions of appellate practice were urged upon our attention, but their statement and consideration have become unnecessary through the concession of counsel for plaintiffs in error, made during the oral argument and acted upon at the time, that the writ of error might be dismissed as to the Aultman and Miller Buckeye Co., the Consolidated Steel and Wire Co., and the Galveston Rope Co. Therefore, attention need be given only to the ruling upon the plea in abatement.

Our power to review this ruling is challenged, because of the statutory provision that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat., § 1011. This provision has been part of the judiciary acts from the beginning, and often has been applied upon writs of error to the circuit and district courts, but never to a case coming here from a state court. *Piquignot* v. *Pennsylvania Railroad Co.*, 16 How. 104, and *Stephens* v. *Monongahela Bank*, 111 U. S. 197, illustrate its application in cases brought here from

circuit courts, and *International Textbook Co.* v. *Pigg*, 217 U. S. 91, and *International Textbook Co.* v. *Lynch*, 218 U. S. 664, are cases in which it was not applied upon writs of error to state courts. This difference in the treatment of the two classes of cases has not been inadvertent but deliberate, and the reason for it is at once apparent when § 22 of the original Judiciary Act, 1 Stat. 84, c. 20, is examined. The provision originated in that section and was there associated with other provisions which unmistakably show that it was intended to embrace only writs of error to the circuit and district courts. At the time of the revision in 1873, § 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning. Rev. Stat., § 5600; *Hyde* v. *United States*, 225 U. S. 347, 361; *McDonald* v. *Hovey*, 110 U. S. 619. This is a writ of error to a state court, and so our power to review the ruling upon the plea in abatement is not affected by § 1011.

The statute of Kansas under which the plea was sustained is embodied in the General Statutes of 1905, and provides, in §§ 1332–1336, that to entitle a corporation organized under the laws of another State to do business in Kansas it must (*a*) make application to, and obtain the permission of, the Charter Board of the State, (*b*) accompany its application with a fee of $25.00, (*c*) file with the Secretary of State its irrevocable consent that process against it may be served upon that officer, (*d*) be organized for a purpose for which a domestic corporation may be organized, (*e*) pay to the State Treasurer, for the benefit of the permanent school fund, a specified per cent. of its authorized capital, and (*f*) file with the Secretary of State a certified copy of its charter. And by § 1358 the

statute provides that each corporation for profit, doing business in the State, except banking, insurance and railroad corporations, shall annually prepare and deliver to the Secretary of State a complete and detailed statement, exhibiting: "1st. The authorized capital stock. 2nd. The paid-up capital stock. 3rd. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid for by each. 6th. The names and postoffice addresses of the officers, trustees or directors and manager elected for the ensuing year, together with a certificate of the time and manner in which such election was held." This section further provides that a failure to file such statement by any corporation doing business in the State and not organized under its laws shall work a forfeiture of the right or authority to do business in the State, and that "No action shall be maintained or recovery had in any of the courts of this State by any corporation doing business in this State without first obtaining the certificate of the Secretary of State that statements provided for in this section have been properly made."

The four corporations against which the plea was sustained were corporations for profit organized under the laws of States other than Kansas, were not banking, insurance or railroad corporations, were doing business in Kansas—a purely interstate business—and had not complied with the statute just described. There can be no doubt, therefore, that if the statute, especially § 1358, is valid as against such corporations, the plea was rightly sustained; otherwise, it should have been overruled. So, the question for decision is, whether, consistently with the commerce clause of the Constitution of the United States, a State may thus restrict and burden the right to do interstate business within its limits. This precise

question was presented to this court and decided in the negative in the case of *International Textbook Co.* v. *Pigg*, 217 U. S. 91, a case in which the Supreme Court of Kansas had applied the provisions of § 1358 (§ 1283, Gen. Stat. 1901) to a corporation of another State doing an interstate business in Kansas. And the decision of this court in that case was shortly thereafter followed in the similar case of *International Textbook Co.* v. *Lynch*, 218 U. S. 664, brought here on error to the Supreme Court of Vermont. It is due to the Supreme Court of Kansas to observe that this court's decision in the *Pigg Case* had not been made when that court's decision in the present case was given; but in saying this we would not be understood as implying that this court announced any new doctrine in the *Pigg Case*, for it but reiterated and applied principles which were already well recognized, as was shown in the earlier cases of *Paul* v. *Virginia*, 8 Wall. 168, 182; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 734, and *Crutcher* v. *Kentucky*, 141 U. S. 47, 56.

As accurately reflecting what was held in the *Pigg Case*, we excerpt the following from the opinion of the court, delivered by Mr. Justice Harlan (pp. 109, 112):

"'To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.'

* * * * * * * *

"How far a corporation of one State is entitled to claim in another State, where it is doing business, equality of treatment with individual citizens in respect of the right

to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the Statement mentioned in § 1283 [§ 1358, Gen. Stat. 1905] of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a Statement setting forth certain facts which the State, confessedly, could not control by legislation. It results that the provision as to the Statement mentioned in § 1283 [§ 1358, Gen. Stat. 1905] must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

Following the decision in that case, we hold that the statute upon which the plea in abatement was rested is unconstitutional and void, and that the plea should not have been sustained but overruled.

The judgment is reversed as to the remaining plaintiffs in error, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE PITNEY did not hear the argument or participate in the decision of this case.

YAZOO AND MISSISSIPPI VALLEY RAILROAD CO. *v.* JACKSON VINEGAR CO.

ERROR TO THE CIRCUIT COURT OF HINDS COUNTY, STATE OF MISSISSIPPI.

No. 57. Submitted November 13, 1912.—Decided December 2, 1912.

The statute of Mississippi imposing a penalty on common carriers for failure to settle claims for lost or damaged freight in shipment within the State within a reasonable specified period is not unconstitutional under the Fourteenth Amendment, as depriving the carrier of its property without due process of law or as denying it the equal protection of the laws, as to claimants presenting actual claims for amounts actually due.

It is within the police power of the State to provide by penalty for delay a reasonable incentive for prompt settlement without suit of just demands of a class admitting of special legislative treatment; in this case of claims against common carriers for damage to goods shipped between two points within the State.

This court deals with the case in hand and not with imaginary ones; and if a state statute is constitutional as against the class to which the party attacking it belongs, it will not consider whether the same statute might be unconstitutional as applied to other classes not before the court.

Quære, and not now to be decided, whether the statute now sustained as constitutional as against the party attacking it would be void *in toto* if unconstitutional as against other classes who have not yet attacked it.

THE facts, which involve the constitutionality of a statute of Mississippi imposing penalties on common carriers for failure to settle claims for damage to goods in shipment within the State, are stated in the opinion.

Mr. Edward Mayes and *Mr. Charles N. Burch* for plaintiff in error.

Mr. William H. Watkins for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages from a railway company for the partial loss of a shipment of vinegar carried over the company's line from one point to another in the State of Mississippi. The case originated in a justice's court and was taken on appeal to the Circuit Court of Hinds County, where the plaintiff recovered a judgment for actual damages and $25.00 as a statutory penalty. That being the highest court in the State to which the case could be carried, it was then brought here. The position of the railway company, unsuccessfully taken in the state court and now renewed, is that the Mississippi statute providing for the penalty is repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The statute reads:

"Railroads, corporations and individuals engaged as common carriers in this state are required to settle all claims for lost or damaged freight which has been lost or damaged between two given points on the same line or system, within sixty days from the filing of written notice of the loss or damage with the agent at the point of destination; and where freight is handled by two or more roads or systems of roads, and is lost or damaged, claims therefor shall be settled within ninety days from the filing of written notice thereof with the agent by consignee at the point of destination. A common carrier failing to settle such claims as herein required shall be liable to the consignee for twenty-five dollars damages in each case, in addition to actual damages, all of which may be recovered in the same suit provided that this section shall only apply when the amount claimed is two hundred dollars or less." Laws 1908, c. 196, p. 205.

The facts showing the application made of the statute

are these: The plaintiff gave notice of its claim in the manner prescribed, placing its damages at $4.76, and, upon the railway company's failure to settle within sixty days, sued to recover that sum and the statutory penalty. Upon the trial the damages were assessed at the sum stated in the notice, and judgment was given therefor, with the penalty. Thus, the claim presented in advance of the suit, and which the railway company failed to settle within the time allotted, was fully sustained.

As applied to such a case, we think the statute is not repugnant to either the due process of law or the equal protection clause of the Constitution, but, on the contrary, merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment. See *Seaboard Air Line Railway* v. *Seegers*, 207 U. S. 73; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Wynne*, 224 U. S. 354.

Although seemingly conceding thus much, counsel for the railway company urge that the statute is not confined to cases like the present, but equally penalizes the failure to accede to an excessive or extravagant claim; in other words, that it contemplates the assessment of the penalty in every case where the claim presented is not settled within the time allotted, regardless of whether, or how much, the recovery falls short of the amount claimed. But it is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect. Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to

hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now. *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Lee* v. *New Jersey*, 207 U. S. 67, 70; *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Collins* v. *Texas*, 223 U. S. 288, 295; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550.

The judgment is accordingly

Affirmed.

GERMAN ALLIANCE INSURANCE COMPANY *v.* HOME WATER SUPPLY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 19. Argued April 26, 1912.—Decided December 2, 1912.

A municipality is not bound to furnish water for fire protection, and if it voluntarily undertakes to do so it does not subject itself to a greater liability.

While a diversity of opinion exists, a majority of the American courts hold that the taxpayer has no such direct interest in an agreement between the municipality and a corporation for supplying water as will allow him to sue either *ex contractu* for breach, or *ex delicto* for violation, of the public duty thereby assumed.

In this case *held* that a taxpayer has no claim against a water supply company for damages resulting from a failure of the company to perform the contract with the municipality.

One agreeing to perform a public service for a municipality is responsible for torts to third persons, but for omissions and breaches of contract he is responsible to the municipality alone.

A contract between a public service corporation and the municipality should not be unduly extended so as to introduce new parties and new rights and subject those contracting to suits by a multitude of

persons for damages for causes which could not in the nature of things have been in contemplation of the parties.

The conclusion that a property owner has no claim against a water supply company for failure to conform to the contract does not deprive him of any right, for had the municipality been guilty of the same acts no suit could be maintained.

In *Guardian Trust Co.* v. *Fisher*, 200 U. S. 57, the contract with the water company expressly provided for liability of the company to third parties, and the state court having held that, under the law of North Carolina, an action of this nature can be maintained, that question was not in issue in this court.

What is said in an opinion of this court must be limited to the facts and issues involved in the particular record under investigation.

Guardian Trust Co. v. *Fisher* did not overrule *National Bank* v. *Grand Lodge*, 98 U. S. 124, holding that a third person cannot sue for the breach of a contract to which he is a stranger unless in privity with the parties and is therein given a direct interest.

"THE Spartan Mills" owned a number of houses in Spartanburg, South Carolina. They were damaged by fire on March 25, 1907. The German Alliance Company, which had insured the buildings, paid $68,000, the amount of the loss, took from the mills an assignment "of all claims and demands against any person arising from or connected with the loss or damage," and brought suit, in the United States Court for the District of South Carolina, against the Home Water Supply Company, on the ground that the fire could easily have been extinguished and the damage prevented if the Water Company had complied with its contract and duty to furnish the inhabitants of the city with water for fire protection.

The complaint alleged that on February 14, 1900, the City Council adopted an ordinance, ratifying a contract, previously prepared, between the city and the Water Company, by which the latter was empowered, for a term of 33 years, to lay and maintain pipes in the streets and operate waterworks with which "to supply the city and its inhabitants with water suitable for fire, sanitary and domestic purposes." The city agreed to use the hydrants

for the extinguishment of fires and sprinkling purposes only; to make good any injury which might happen to them when used by its fire department; to pay rent for fire protection, for the term of ten years, at the rate of $40 per year for each hydrant, and, annually, to levy a tax sufficient to pay what should become due under the contract.

The company agreed to lay at least six miles of pipe, but on 60 days' notice from the city would lay additional pipes and install hydrants, not less than ten to the mile, for each of which the city was to pay $40 per year.

The company agreed to keep all hydrants supplied with water for fire protection, and to maintain a height of at least 70 feet of water in the standpipe. If any hydrant remained out of order for more than 24 hours, after notice, the company was to pay the city $7 per week while each hydrant was unfit for use.

It was further alleged that in 1905 and 1906 the city ordered the company to "put in certain hydrants with connecting pipes," "which order, if obeyed, would have carried water protection to within about 200 feet of the building which first caught fire on March 25, 1907, instead of 650 feet, which was the distance of the nearest hydrant to the said fire on said day; that in violation of its duty and obligation to adequately protect the property from fire, and in defiance of the order of council, the defendant failed to make such extensions, and as a direct result there was no plug near enough to furnish water to extinguish said fire—all due to the defendant's culpable and wilful negligence and disregard of duty and obligations to said city and its inhabitants."

Other breaches were charged, in laying 4-inch instead of 6-inch pipe; in neglecting to install the electric cut-off, and "in failing absolutely to furnish water with which to extinguish such fire and prevent its spreading to other houses."

The defendant made no question as to the right of the

Insurance Company to maintain the action if the Spartan Mills could have done so, but filed a general demurrer which was sustained July 14, 1908. That judgment was affirmed November 4, 1909, by the Circuit Court of Appeals, (174 Fed. Rep. 764), and the case was brought here by writ of certiorari.

Mr. Hartwell Cabell, with whom *Mr. Stanyarne Wilson* was on the brief, for petitioner:

The only question presented by the demurrer to the complaint is whether an action in tort will lie against a private water company whose negligence and willful disregard of its duties in supplying water has been the proximate cause of loss of plaintiff's property.

Guardian Trust Co. v. *Fisher*, 200 U. S. 57, sustained such a right against a water company by whose negligent performance of its duties private property had been destroyed; that decision was binding upon the lower Federal courts and the affirmance of the judgment of the Circuit Court dismissing the complaint, was in effect a refusal of the court below to follow the law as laid down by this court. In that case the judgment recited that the recovery was for a tortious injury and damage done by the negligence of the defendant. *Fisher* v. *Greensboro Water Supply Co.*, 128 No. Car. 375.

The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell* v. *Greensboro Water Supply Co.*, 124 No. Car. 328; *Jones* v. *Durham Water Co.*, 135 No. Car. 553) proceeded upon the theory of the right of the party aggrieved to recover in an action upon the contract with the municipality, holding that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon. There was therefore no "rule of property" in North Carolina arising out of numerous adjudications upon the con-

struction of § 1255, which Federal courts would feel inclined to follow.

Federal courts in construing state statutes have uniformly declared their independence of state decisions, where the questions involved were matters of a general nature; or the terms to be defined those of general use in jurisprudence. *Swift* v. *Tyson*, 16 Peters, 1; *B. & O. R. R.* v. *Baugh*, 149 U. S. 368; *Venice* v. *Murdock*, 92 U. S. 494, 501; *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S. 67; *Burgess* v. *Seligman*, 107 U. S. 20, 34.

This court has committed the Federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*. *Guardian Trust Co.* v. *Fisher*, *supra;* and see *Mugge* v. *Tampa Water Works Co.*, 42 So. Rep. 81; *Ancrum* v. *Camden Water, Light & Ice Co.*, 64 S. E. Rep. 151; *Knuth* v. *Butler Elect. Ry.*, 148 Fed. Rep. 73.

Private corporations who contract with municipalities to supply water for public and private use, enjoy, through the nature of their business, valuable franchises, rights and privileges. They are granted monopolies for long terms; they exercise the right of eminent domain, by virtue of which they use the public streets and highways, condemn private property, enter upon the premises of citizens, and possess other privileges of an extraordinary nature. In return and in consideration of a stipulated charge, they undertake to furnish water to the municipality and its inhabitants for fire protection and domestic purposes.

The English courts from early times have held that when an individual or a private corporation for valuable consideration has contracted to render services of a public nature, such individual or corporation by operation of law

becomes charged with a duty to the public and may be held liable for the negligent discharge of that duty to any member of the public who may be injured thereby. *The Mayor &c.* v. *Henley*, 3 B. & A. 77; *Paine* v. *Partridge*, 1 Shower, 255; *Mayor of Lynn* v. *Turner*, Cowp. 86; *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co.* v. *Baldwin*, 37 N. Y. 648; *Little* v. *Banks*, 85 N. Y. 258; *Lampert* v. *Laclede Gas Light Co.*, 14 Mo. App. 376; *Appleby* v. *The State*, 16 Vroom. (N. J.) 161.

The right of a private citizen to recover as for a tort against a water company whose failure to furnish adequate water for fire protection has caused damage, has been sustained in a number of cases. *Paducah Lumber Co.* v. *Paducah Water Supply Co.*, 89 Kentucky, 340; *Griffin* v. *Goldsboro Water Co.*, 122 No. Car. 206; *Fisher* v. *Greensboro Water Supply Co.*, 128 No. Car. 375; *Mugge* v. *Tampa Water Works Co.* (Fla.), 42 So. Rep. 81.

The neglect or failure to do the things that should be done in order to perform the contract properly, is not nonfeasance, but misfeasance. *Gregor* v. *Cady*, 82 Maine, 131, 136; *Olmstead* v. *Morris Aqueduct*, 17 Vroom. 495, 501; *House* v. *Houston W. W. Co.*, 88 Texas, 233; *Wainwright* v. *Queens Co. Water Co.*, 78 Hun, 146; *Ukiah City* v. *Ukiah Water Co.*, 75 Pac. Rep. 773; *Howsman* v. *Trenton Water Co.*, 119 Missouri, 304, holding that the duty to furnish water at the hydrants was one owing to the general public in its collective capacity and not to individuals composing the general public are not supported in reason and are answered in *Planters' Oil Mill* v. *Monroe Waterworks & Light Co.* (1900), 52 La. Ann. 1243, p. 1250.

The question is, for whose benefit the water was brought to the hydrant to be used to extinguish fires, that of the city as such or of the individual property owner whose property lies within the protected zone?

Ferris v. *Carson Water Co.*, 16 Nevada, 44, can be distinguished, and see *Bonaparte* v. *Camden & Amboy R. R. Co.*, Baldwin C. C. (U. S.) 205, 223; *Kiernan* v. *Metropolitan Construction Co.*, 170 Massachusetts, 378; *Borough of Washington* v. *Washington Water Co.*, 4 Robbins (N. J.), 254; *Public Service Corp.* v. *American Lighting Co.*, 1 Robbins, 122, as to the rights of individuals and duties of public utilities corporations.

The immunity from suit enjoyed by a municipality which undertakes to furnish water for fire purposes does not inure to the benefit of a private water company with which it has contracted for such supply. The cases which hold otherwise, *Britton* v. *Green Bay Water Co.*, 81 Wisconsin, 48; *Nichol* v. *Huntington Water Co.*, 53 W. Va. 348; *Akron Water Works Co.* v. *Brownless*, 10 Ohio C. C. 620, are in error.

The individual property owner may be without a remedy against the city simply because the city in providing fire protection exercises the sovereign power of the State and hence cannot be sued, as held in *Springfield Ins. Co.* v. *Keeseville*, 148 N. Y. 46, but it does not follow that because a municipality is not liable to individuals, a private water company which undertakes to perform the same acts is also not liable. *Mills W. W. Co.* v. *Forrest*, 97 N. Y. 97.

The objection that unless water companies are protected from the consequences of their own faults capitalists would not readily seek investment in enterprises involving such incalculable hazards, and the general public would lose the benefits now derived from them should not prevail.

To permit a tort feasor to escape the result of his own acts or omissions merely because his disregard of the duties laid upon him by law has caused a loss to others, which, by reason of its magnitude it would ruin him to pay, is surely a strange doctrine.

Mr. I. A. Phifer, with whom *Mr. Ralph K. Carson* was on the brief, for respondent.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

In *Ancrum* v. *Camden Water Company*, 82 S. Car. 284, the Supreme Court of South Carolina, construing a contract much like the one here involved, held that a taxpayer could not maintain an action against a Water Company for damage due to its failure to furnish water as required by such an agreement with the city. The plaintiff, however, contends that although the present suit is for damage to property located in South Carolina, that decision is not of controlling authority, because it was rendered two years after this action was begun. Relying on *Burgess* v. *Seligman*, 107 U. S. 20, it insists that when the contract was made, February, 1900, there was no settled state law on the subject, and therefore the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability to a taxpayer for failure to furnish fire protection, according to the terms of its contract with the city.

The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities—though, with the introduction of reservoirs, standpipes, pumping stations and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was

no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes. And there could, of course, be no liability for the breach of a common law, statutory or charter duty which did not exist. It is argued, however, that even if, in the first instance, the law did not oblige the company to furnish property owners with water, such a duty arose out of the public service upon which the defendant entered. But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, so as to bring the case within the principle applicable to the sale of unwholesome provisions, or misbranded poisons which, in their intended use, would be injurious to purchasers from the original vendee. So that, notwithstanding numerous charges of culpable, wanton and malicious neglect of duty, this suit—whether regarded as *ex contractu* or *ex delicto*—is for breach of the provisions of the contract of February 14, 1900, which must, therefore, be the measure of plaintiff's right and of the defendant's liability.

Whether a right of action arises, out of such a contract, in favor of a taxpayer is a matter about which there has been much discussion and some conflict in decisions. Although for nearly a century it has been common for private corporations to supply cities with water under this

sort of agreement, we find no record of a suit like this prior to 1878, when the Supreme Court of Connecticut, in a brief decision (*Nickerson* v. *Hydraulic Co.*, 46 Connecticut, 24), held that the property owner was a stranger to the agreement with the municipality, and, therefore, could not maintain an action against the company for a breach of its contract with the city. Since that time similar suits, some in tort and some for a breach of the contract, have been brought in many other States. In view of the importance of the question, the subject has been examined and reëxamined, the contract subjected to the most critical analysis and many elaborate opinions have been rendered. They are cited in 3 Dillon Munic. Corp., § 1340, and in *Ancrum* v. *Water Co.*, 82 S. Car. 284.

From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements and, therefore, cannot sue *ex contractu*. Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto*. A different conclusion is reached by the Supreme Courts of three States, in cases cited and discussed in *Mugge* v. *Tampa Water Works*, 52 Florida, 371. They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed.

The plaintiff presses these decisions to their logical conclusion and sues,—not for negligence in operating the plant, but for breach of the contract of construction. The complaint charges that as a direct consequence of the refusal to lay the pipes, as provided by the contract, there was no plug near enough to extinguish the fire. The other allegations as to putting in 4-inch instead of 6-inch pipe and failing to install the electric cut-off are immaterial, except on the theory that if the property owner was, indeed, a beneficiary, it, after acceptance, would be en-

titled to all the rights of the original promisee, and if not otherwise injured, might at least recover nominal damages for any breach. By the same reasoning it, with the other members of the class, might release the company from liability already incurred, or even discharge it altogether from the duty of carrying out the agreement in the future. If this did not entirely substitute the taxpayer for the municipality, it would at least subject the promisor to liability to many, where it only had contracted with one. *Dow* v. *Clark*, 7 Gray, 198, 201.

In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different States. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity, necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Nat. Bk.* v. *Grand Lodge*, 98 U. S. 123, 124. *Hendrick* v. *Lindsay*, 93 U. S. 143, 149; *National Savings Bk.* v. *Ward*, 100 U. S. 195, 202, 205.

Here the city was under no obligation to furnish the manufacturing company with fire protection, and this

agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

He is interested in the faithful performance of contracts of service by policemen, firemen, and mail-contractors, as well as in holding to their warranties the vendors of fire engines. All of these employés, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Negligence in Law (3d ed.), 305; Pollock on Torts (8th ed.), 434, 547; *Davis* v. *Clinton*, 54 Iowa, 59, 61.

Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties.

The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights,

is in accordance with the particular intent of those who made this agreement.

If the company had, indeed, made a valid contract for the benefit of a third person, the amount of the damages for which it might be liable would be immaterial. Yet where there is no such express agreement, and liability to a taxpayer is sought to be raised by implication, it is proper to test the correctness of the proposed construction by noting the results to which it would lead. The contract was made in February, 1900. By its terms the city was, during a period of 10 years, to pay $40 per annum for each hydrant. During that time the property subject to damage by fire might double or quadruple in value. The failure to provide that the water rent of $40 per hydrant should rise or fall with the increase or decrease in such values indicates that liability for damage to that property was not in the contemplation of the parties and that no payment therefor was included in the price for each hydrant. Otherwise the amount of payment would naturally have varied with the risk assumed.

In some States it is held that, in the absence of a statute, a city can neither directly nor indirectly make a contract with a water company that the latter should pay private individuals for fire damage, since that would involve the use of public money to secure a private benefit to the owner of private property. *Hone* v. *Water Co.*, 104 Maine, 217. In *Ancrum* v. *Water Co.*, *supra*, the South Carolina court held that the amount paid per hydrant was so insignificant by comparison with the enormous risk involved, as clearly to indicate that neither the city nor the water company intended that the latter should be liable to the taxpayer for a breach of the company's contract with the city.

This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company

here, no suit could have been maintained against the municipality. There was no creation of a right to fire protection if, instead of doing so itself, the city contracted with a private company to furnish water. It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard by insurance, paying the premium direct to an insurance company instead of indirectly through taxation. When, in pursuance of such precaution, the Spartan Mills insured the houses, and the plaintiff later settled the fire loss, there was no right of action in favor of the manufacturing company against the Water Company to which the Insurance Company could be subrogated.

The plaintiff urges that, whatever the rule elsewhere, it is entitled to recover under the decision in *Guardian Trust Company* v. *Fisher*, 200 U. S. 57. But the facts there differ from those in this record. There the water company had an exclusive right, to use the streets in the city of Greensboro, under an ordinance which, among other things, provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." (p. 58.) Buildings were destroyed as a result of the negligent failure of the company to furnish sufficient water while operating its plant. The owner brought suit against the water company in the courts of North Carolina, where it had previously been settled that such actions could be maintained. He recovered a judgment "for the tortious injury and damage done to the plaintiff by the negligence of the defendant." 128 No. Car. 375; 115 Fed. Rep. 187. Execution issued, but no levy could be made, because the property of the water company was in possession of a receiver, appointed in foreclosure proceedings pending in the United States

court. The plaintiff intervened therein, claiming that he was entitled to be paid before the bondholders by virtue of the North Carolina statute, which provided that "judgments for corporate torts" should take priority over older mortgages.

It was urged, among other things, by the bondholders that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute.

It was that question alone, as to the character of the suit and judgment, which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The *Fisher Case* could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the state court. It raised no Federal question and was not in issue on the hearing in this court. Neither did the *Fisher Case* overrule the principle, announced in *National Bank* v. *Grand Lodge*, 98 U. S. 123, 124, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest. The judgment of the Circuit Court of Appeals is

Affirmed.

VEVE *v.* SANCHEZ.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 42. Argued November 7, 1912.—Decided December 2, 1912.

While a tract may be so well known by name that it can be described and conveyed without other designation, ordinarily designation by name will yield to the more definite by metes and bounds; and in this case the latter rule should apply.

The construction of the description in a mortgage should not depend on the amount of land owned by the mortgagor but on the specific boundaries.

The general rule in determining what is included in a conveyance is that general calls for quantity must yield to the more certain and locative lines of the adjoining owners which are, or can be made, certain.

Nothing in this case warrants a departure from this long established and necessary rule of title.

In ejectment the plaintiff must recover on the strength of his own title and cannot prove by parol that a part of the land conveyed was not included in the grant; a contrary rule would make every grantee liable to have what had been conveyed to him taken away by word of mouth.

The rule prohibiting written contracts from being varied by parol is not confined to the common law, but was in force in Porto Rico in 1885 and since then.

The statement in a conveyance that the grantor is the owner of the property described estops the grantor from denying his right to convey, and if not the owner at the time his subsequent acquisition inures to the benefit of the vendee.

4 Porto Rico Fed. Rep. 329, reversed.

THE facts, which involve the rights of a mortgagee under a mortgage of land in Porto Rico, are stated in the opinion.

Mr. Charles Hartzell, with whom *Mr. Manuel Rodriguez-Serra* was on the brief, for plaintiffs in error.

Mr. Jose R. F. Savage, with whom *Mr. Hector H. Scoville* was on the brief, for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1885 Jose Avalo Sanchez mortgaged to Dona Maria Diaz y Siaca a sugar plantation in Porto Rico known as Bello Sitio, described as containing 400 cuerdas, and bounded on the north, south, east and west by the colindantes, or adjoining land owners, whose names were given. Suit to foreclose was instituted in 1889 and at the end of three years the mortgagee obtained a decree which, how-

ever, instead of ending the controversy, was the beginning of litigation in the Spanish courts which is said to have been the most protracted and bitter in the history of the Island of Porto Rico.

The record of the various proceedings is involved and complicated, but it appears that Mrs. Diaz purchased, at the foreclosure sale, and apparently in accordance with Spanish custom, (4 Wall. 261), was put in possession on October 30, 1891. But before she received the judicial deed, attachments were levied on Bello Sitio, on a lot afterward called Sauri, "in the center of the same" and on certain personalty, as the property of Sanchez. About the same time a concurso of creditors, in the nature of bankruptcy proceeding, was begun against him. The trustee apparently went through the form of taking possession of all property of Sanchez, including Bello Sitio, though without actually evicting Mrs. Diaz. Sanchez himself later instituted proceedings to cancel the mortgage and judicial deed under which Mrs. Diaz claimed title. He failed in this suit, but the other branches of the litigation continued for 16 years and, after the death of Mrs. Diaz, finally terminated in 1907, when the Supreme Court of the Island held that the attachment should be released, the bankruptcy proceedings dismissed, and all the property returned to Sanchez, except Bello Sitio, which was to remain at the disposal, of the heirs of Mrs. Diaz.

Both parties seem to have considered this a decision in their favor—the plaintiff claiming that it adjudged to him everything that was not Bello Sitio, and the defendants that it restored to them all that was included in the mortgage.

In the meantime Sanchez (in 1906) filed a bill in the United States court for Porto Rico, in which, as appears from statements in the opinion of the court, he attacked all of the proceedings in the Spanish tribunals as fraudulent, and asked that the mortgage foreclosure be set

aside and himself declared to be the owner of Bello Sitio. Whether any issue was therein presented, or legally involved, as to the boundaries of the land, cannot, in the absence of a copy of the pleadings, be determined. On demurrer this bill was dismissed for laches and want of equity.

Sanchez then brought the present suit for the recovery of 134 cuerdas of land, (lying within the exterior limits of Bello Sitio), and $60,000 as damages for improvements destroyed, crops removed, and mesne profits, from 1891 to 1907, during which time, he alleges, that the defendants and their ancestor, Mrs. Diaz, had usurped the premises, by means of false and fraudulent claims instituted in the Porto Rican courts. On demurrer the court held that the suit should be treated solely as an action in ejectment.

The defendants plead *res adjudicata*, title by prescription and title under the mortgage foreclosure. We need only consider the question presented by the claim in the answer "that the 400 cuerdas, known as the Hacienda Bello Sitio, includes the several parcels of land described in the plaintiff's complaint."

On the first hearing there was a mistrial. On the second, plaintiff offered evidence to show that between 1878 and 1880, he purchased three small lots forming a part of the tract mentioned in the complaint; that on January 5, 1880, he bought Bello Sitio from Monserrate Garcia, at the same time occupying, as lessee, the lot called Sauri. He admitted that "the land for which he is now suing was in the middle of what was formerly Bello Sitio," but claimed that Mrs. Diaz knew, or ought to have known, that the mortgage, dated May 28, 1885, did not convey Sauri, because he did not then own that place, and did not purchase it until June 15, 1885, three weeks later. There was evidence that, in 1892, during the bankruptcy, a survey was made with a view to marking the lines between Bello Sitio and the land now sued for; that the agent of

Mrs. Diaz was present and assented to the correctness of the survey. But if his admissions at that time could have bound the principal, or if he had authority to establish a new line by parol, the agreement was never executed by any change in possession, the complaint itself alleging that Mrs. Diaz and her heirs had been in possession since 1891. Plaintiff also relied on the records in the Spanish courts, which showed that from the time Mrs. Diaz took possession in 1891, he, his creditors and the trustee in bankruptcy, had persistently claimed that Sauri, and the other land now sued for, formed no part of Bello Sitio, and was not included in the mortgage. On the other hand, the defendants insisted that a single, not a divided tract, was conveyed by the mortgage, which, as translated, described the land as being "a sugar cane plantation known as Bello Sitio . . . composed of 400 cuerdas of land, equivalent to 157 hectares, 21 areas and 59 centiares with its buildings . . . and other appurtenances used in its cultivation. Said land being bounded on the north by the property of Isabel Siaca and by lands of the plantation 'Convento' belonging to Pilar Becerril y Torres; on the east by land of Nicolas Telemaco and by lands of Benigno and Sebastian de Santiago; on the south by the property called 'Ausubal' belonging to the Succession of Alejandrina Becerril y Torres, with lands belonging to Concepcion Lopez and by the property belonging to the Successors of Alberto Western and the Luquillo-Fajardo road; and on the west by lands belonging to Enrique Garcia and those of Nicolas Perez and of Gervasio Rivera."

A plat of Bello Sitio, made in 1907, showed that it contained exactly 415 cuerdas, and the defendants contended that if the 134 sued for were excluded, only 279 would be left, although the mortgage purported to convey 400 cuerdas. The plaintiff denied that the plat made in 1907 correctly represented the land which he had conveyed in 1885, insisting that, excluding Sauri, he bought 400 cuerdas

from Monserrate Garcia, and had conveyed that quantity to Mrs. Diaz. He claimed that if there was any present deficiency, it was due to encroachments by the adjoining land owners. He did not, however, establish what, if any, change had been made, while the surveyor testified that he followed the boundaries of Bello Sitio as indicated by ditches, fences, trees, stakes, and the documents of the adjoining land owners, all of whom were present when the survey was made and assented to its correctness. The land owners were also examined. Some of them had known the property from the date of the mortgage, and others, who were younger, for a shorter time. But all testified that they knew of no change in the lines.

The jury found a verdict for the plaintiff. A motion for a new trial was overruled. The case is here on assignments, which relate to rulings in admitting and excluding testimony, in charging and refusing to charge the jury, and in failing to direct a verdict for the defendants.

The plaintiff's testimony established that he was in possession of Bello Sitio as owner, and of Sauri as lessee when he made the mortgage on May 28, 1885. Three weeks later, he purchased Sauri and established a title on which he was entitled to recover, unless it, and the other three lots sued for, were included in the mortgage which described the property by name (Bello Sitio), by quantity (400 cuerdas) and by colindancias or adjoiners, on the north, east, south and west.

A tract may be so well known by name, that it can be described and conveyed without other designation. And there are cases where, in the sale of a ranch, or of an island, or of a well known plantation, the limits described by name have prevailed, when there was a discrepancy between it and other descriptive terms set out in the same deed. *Lodge* v. *Lee*, 6 Cranch, 237.

Ordinarily, however, designation by name will yield to the more definite description by metes and bounds. In

this case there was nothing to show that "Bello Sitio" was understood to mean or describe a Hacienda of clearly defined limits; and there was no basis for a charge as to the conditions on which such designation could prevail over the other calls in the mortgage. No instruction on that subject was given, but the court did charge the jury as to the effect of a description by quantity, telling them that they might consider the terms of the mortgage and all documents referred to in it, the condition of the property and circumstances surrounding the transaction, and if they found that, at the time the mortgage was signed, the plaintiff did not own 400 cuerdas, and afterwards acquired sufficient to make up what Mrs. Diaz believed and had reason to believe was included in the mortgage, then the law will hold that such land is included and they must find for the defendants so as to make up the full quantity of land. Conversely, they were instructed that "if when Sanchez made the mortgage he was in possession of a tract bought from Monserrate Garcia that contained 400 cuerdas, then they must find, under the language of the descriptive clause of the mortgage, that he did not convey to her any of the tracts he now sues for."

This makes the construction of the mortgage depend—not upon its language, but upon the quantity of land the mortgagor owned at the date of its execution, and required the jury to make designation by cuerdas prevail over description by specific boundaries. This is contrary to the rule that calls for quantity must yield to the more certain and locative lines of the adjoining owners. Such lines are certain, or they can be made certain, and may be platted so as to show the exact course and distance. They are treated as a sort of natural monument, and must prevail over the more general and less distinct designation by quantity. *Bartlett Land Co.* v. *Saunders*, 103 U. S. 316; *Whiting* v. *Dewey*, 15 Pick. 428, 434; *Cox* v. *McGowan*, 116

No. Car. 131, 135; *Reed* v. *Proprietors*, 8 How. 274, 289; *Leonard* v. *Forbing*, 109 Louisiana, 220.

2. It was argued that this rule was not applicable to Porto Rican deeds, made at a time when loose and indefinite methods of describing land were used. *Doolan* v. *Carr*, 125 U. S. 618, 632. But we find nothing in this case to warrant a departure from a rule long established and necessary to the protection of titles. The mortgage adopted a common method of bounding land. If there had been any error in describing what had been conveyed it became manifest when Mrs. Diaz took possession in 1891. If there was a mutual mistake, proceedings could have been brought to reform the mortgage and on such trial most of the evidence upon which plaintiff now relies might have been relevant. But in this action of ejectment he must recover on the strength of his own title and cannot prevail against those who hold under an instrument signed by him and which, in unambiguous terms, conveyed—not two separate tracts but a single body of land with definitely described continuous exterior boundaries. To permit a grantor, on the claim that an ambiguity existed, to prove by parol that a lot in the center of such a tract had not been conveyed would make every grantee liable to have what had been conveyed in writing taken away by word of mouth.

3. The rule prohibiting written contracts from being varied by parol is not confined to the common law, but was of force in Porto Rico when this mortgage was made, and its enforcement in construing the descriptive clause according to accepted rules governing boundaries preserves the rights of the parties here. Sanchez was in possession of Sauri, as lessee, when the mortgage was made. That possession was itself a *prima facie* indication of title. He conveyed 400 cuerdas bounded by the adjoining land lines. There is a claim, not established proof, that these lines had been changed. The slight excess of fifteen

cuerdas, shown by a later and accurate survey, is not inconsistent with defendants' right to 400 cuerdas, but confirmatory of their contention (Civil Code, Porto Rico 1471), while if plaintiff recovers the defendants will be left in possession of only 279 cuerdas, when the mortgage conveyed their ancestor 400.

4. Following the descriptive clause in the mortgage was a statement that Sanchez was the owner of the land. In addition to this recital, which, according to *Van Rensselaer* v. *Kearney*, 11 How. 297, 322–326, would be equivalent to a covenant of warranty and ownership, it was claimed that, under the laws of Porto Rico (Civil Code, 1474) a warranty was implied in all conveyances of real estate. Apparently, in accordance with this view, the judicial deed, made in pursuance of the foreclosure sale, contained a provision that "the debtor, Jose Avalo Sanchez, remains bound under the present sale to guarantee the title in accordance with law." These facts estopped Sanchez from denying that he had the right to dispose of all the property which the mortgage purported to convey. For, having received the money on the faith of the statement that he was the owner of the property, he was bound to repay that sum; or, failing that, to perfect the title on which the money had been advanced. So that when he acquired what is now called Sauri, but which had been originally included in the land conveyed by the mortgage, the title enured to the benefit of his vendee. *Amonett* v. *Amis*, 16 La. Ann. 225; *Lee* v. *Ferguson*, 5 La. Ann. 533; *Stokes* v. *Shackelford*, 12 La. Ann. 172; *New Orleans* v. *Riddle*, 113 Louisiana, 1051; *Partida* v. *Tv.*, L. 51; Ib. T. XIII, L. 50; *Van Renssellaer* v. *Kearney*, 11 How. 297, 322–326; *Bush* v. *Cooper's Admr.*, 18 How. 82, 85; *Moore* v. *Crawford*, 130 U. S. 122.

The judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

BEACH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 7. Argued October 30, 1912.—Decided December 2, 1912.

Recitals by the Court of Claims of the documents upon which the claimant's case alone can rest with a history of the transaction and an express finding that the evidence does not establish the transfer to the Government of that for which claimant demands compensation, with negative findings of claimant's title, are sufficient findings of the ultimate facts to conform to the rules.

Whether claimant's claim rests upon an express or an implied purchase, by an officer of the Government, a lack of power on the part of that officer is a fundamental objection.

The provision in the Post Office Appropriation Act of July 13, 1892, 27 Stat. 145, c. 165, authorizing the Postmaster General to examine into transportation of mail by pneumatic tubes did not authorize the purchase of any apparatus or patents, and all parties including claimant were notified of this by the Postmaster General.

Under no other statutes enacted prior to the inception of the claimant's demand was the Postmaster General authorized to purchase or contract for apparatus or patents for pneumatic tubes.

The retention without express rejection of a proposal in answer to an advertisement of the Postmaster General which expressly states that the proposals are for investigation and estimate and that the Postmaster General has no authority to contract for expenditure of money does not constitute a contract either express or implied.

A proposal to sell to an officer of the United States that purports to be an assignment *in præsenti* but which is not in form or substance an assignment and which expressly states that it shall not be binding on the proposer unless accepted by that officer before a specified date, does not become a contract express or implied because of the nonaction by that officer on the proposal.

The retention by the officer of the United States without rejection of a proposal, which contains four different propositions of sale of the same article, only one of which could be accepted, cannot be treated as an acceptance of any one of the propositions.

He who is without authority to bind his principal by express contract cannot be held to have done so by implication; and the want of au-

thority on the part of the officer of the United States to whom delivery is claimed is fatal to the establishment of an implied contract.

In this case one claiming to have sold patents for pneumatic mail tubes to the Postmaster General having failed to show any use of his devices or inventions by the Government, or that any devices or inventions used were those covered by his patents, the Court of Claims rightly dismissed his petition.

41 Ct. Cls. 110, affirmed.

THIS is an appeal from a judgment of the Court of Claims dismissing the petition of claimant (now appellant) whereby he sought to recover the sum of twenty millions of dollars for certain inventions and letters patent pertaining to pneumatic transportation alleged to have been sold and transferred by him to the United States in the year 1893, by agreement, express or implied, made between the claimant and the Postmaster-General. 41 Ct. of Claims, 110.

The following is a sufficient outline of the findings of fact in that court:

Prior to July 26, 1892, the claimant, James W. Beach, had been granted certain letters patent for inventions or improvements relating to pneumatic transportation, to wit, letters patent No. 267,318, dated November 14, 1882, and letters patent No. 444,038, dated January 6, 1891, the object being to provide a continuous current of air moving at high velocity through a tube or other conduit, and thereby to transport the mails and all suitable commodities through such tube or conduit. Ten prior patents had been issued to other parties by the United States Patent Office for original and new and useful improvements in pneumatic conveyors or devices for the transmission of letters, messages and small packages through small pipes, the first of which patents was issued as early as the year 1864. Pursuant to the authority of § 6 of the post-office appropriation act of July 13, 1892 (27 Stat.

145, c. 165), Hon. John Wanamaker, then Postmaster-General, caused the following advertisement to be published in several newspapers:

"*Mail Service by Pneumatic Tubes or Other Systems.*

"POST-OFFICE DEPARTMENT,
"WASHINGTON, D. C., *July* 26, 1892.

"Authority is given the Postmaster-General by the provisions of the act making appropriations for the service of the Post-Office Department, approved July 13, 1892, 'to examine into the subject of a more rapid dispatch of mail matter between large cities and postoffice stations and transportation terminals located in large cities by means of pneumatic tubes or other systems,' with the view of ascertaining the cost and advantages of the same.

"Acting upon this authority, I hereby give notice to all persons who are the inventors, assignees, or otherwise owners of any pneumatic tube or other device suitable for and adapted to said service to present in writing, under seal, on or before Thursday, the 8th day of September, 1892, addressed to the 'Postmaster-General, Washington, D. C.,' and marked 'Rapid Dispatch of Mails,' a full description of such tube or device, together with a statement of the evidence of title to or ownership of the same, which evidence may subsequently at any time be required by the Postmaster-General. Said description must state the kind and quality of motive power used in operating the same; the method of its application; the capacity of the tube or device, and offer to submit a test; the precise place and terminals where it is proposed to conduct the test; the date at which the tube or device will be in condition to be tested, and the time that will necessarily be occupied in making the test; and, generally, anything else whereby the Postmaster-General can judge of the relative value

of the several tubes or devices that may be submitted and the adaptability of each to said service.

"It is preferred that the tests aforesaid be conducted in the city of New York, Brooklyn, Philadelphia, Chicago, or Washington, D. C., and between adjacent cities, or between a post-office and substation or transportation terminal.

"It is also requested that each of said descriptions be accompanied by a proposal offering to license to, or otherwise invest in, the United States the right to use the tube or device, to lease by the year, or to sell, assign, and transfer it to the United States as a purchaser.

"The tests aforesaid must be made without cost to the United States, and upon the express condition that the person offering said tube or device waives all claim against the United States for any expense attending the construction, tests, or preparation for said tests, or any other expense attending the same. The Postmaster-General has no authority in law to contract for the expenditure of money for the use of or purchase of any such invention, nor is there any existing appropriation out of which the cost of the same could be paid.

"The right is reserved to decline any test of any tube or device submitted in response to this advertisement, and to reject any proposal that may be made.

"The propositions and result of all experiments will be the subject of a report to Congress.

"JOHN WANAMAKER,
"*Postmaster-General.*"

Under date August 20, 1892, the claimant wrote to the Postmaster-General stating that pursuant to the advertisement dated July 26, 1892, he desired to submit a description of a pneumatic tube or device invented and owned by him suitable for and adapted to the rapid dispatch of mail matter between large cities and post-office

stations, and also desired to accompany said description with a "proposal offering to license to or otherwise invest in the United States the right to use the tube or device, to lease by the year, or to sell, assign and transfer it to the United States" as a purchaser; and inquired whether his proposal should or should not name a price at which he (Beach) as the owner aforesaid would so license, lease or sell, assign and transfer to the United States the right to use said tube or device. To this the Postmaster-General replied by letter stating—"The advertisement for pneumatic tubes states each offer shall be accompanied by proposals to license to, or otherwise invest in, the United States the right to use the tube or device, to lease by the year, or to sell, assign or transfer to the United States. Such proposals must, of course, fix some price to be of any value."

Thereupon the claimant, under date August 30, 1892, submitted to the Postmaster-General the following:

"*Proposal of Beach.*

"[Law Office of James W. Beach, 94 Washington Street, Chicago, Illinois.]

"Rapid Dispatch of Mails.

"Hon. John Wanamaker, Postmaster-General, Washington, D. C.

"SIR: In accordance with the advertisement of the Postmaster-General, which said advertisement is dated July 26th, 1892, and is entitled 'Mail service by pneumatic tubes or other systems,' I, the undersigned, James W. Beach, of Chicago, Illinois, hereby propose and offer to license to or otherwise invest in the United States the right to use the said two penumatic devices, or either of them, that is to say, the devices mentioned and described in Letters Patent No. 267,318 and in Letters Patent No. 444,038, granted by the United States to the undersigned, James W. Beach, mentioned and described in the de-

scription of said devices accompanying this proposal, and signed by said James W. Beach (said two devices being also described in Exhibits 'C' and 'D' annexed to the description of said devices filed herewith in the office of the Postmaster-General by the Beach Pneumatic Conveyor Company), or to lease by the year, or to sell, assign, and transfer it to the United States as a purchaser, said right being the exclusive right in and under said letters patent, and each of them, in and to all the States and Territories of the United States, save and excepting therefrom the States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia, heretofore sold and assigned to said Beach Pneumatic Conveyor Company by the undersigned.

"And I, the undersigned James W. Beach, hereby propose and offer as aforesaid to license to or otherwise invest in the United States all of my said right in, to, under, and by virtue of said letters patent, and each of them, in and to all the States and Territories of the United States, save and excepting said States of Maine, New Hampshire, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia, for and in consideration of the payment to me, the said James W. Beach, my heirs, executors, administrators, and assigns, by the United States of the sum of eight hundred thousand dollars ($800,000) on the first day of September in each year during the term of said license or leasing or investment in the United States as aforesaid.

"And I, the undersigned, James W. Beach, hereby further propose and offer to sell, assign, and transfer to the United States all of my said right derived and possessed by me under and by virtue of said two letters patent, in and to all the States and Territories of the United States, save and excepting therefrom the said States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island,

Massachusetts, Michigan, and the District of Columbia, for the sum of twenty millions of dollars ($20,000,000), to be paid by the United States to me, the undersigned, James W. Beach, my heirs, executors, administrators, and assigns, on or before the first day of September, A. D. 1893, and upon payment of said sum of money last mentioned to me at the time and as aforesaid by the United States, I will sell to and make and execute to the United States a good and sufficient assignment and transfer of all of my said rights granted and by me possessed as aforesaid under and by virtue of said two letters patent in and to all the States and Territories, save and excepting therefrom the said States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia.

"And I, the undersigned, hereby further propose and offer to so license, to lease to, or otherwise invest in the United States all of my said right under and by virtue of said two letters patent (for, and the said pneumatic devices or conveyers to be used solely and only for the purpose of collecting and transmitting the United States mails, and for no other purpose or purposes) in said entire United States, save and excepting therefrom the said States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia, upon the express condition that the United States shall pay therefor and in consideration thereof to me, the undersigned, James W. Beach, my heirs, executors, administrators, and assigns, on the first day of September in each year during the term of said license, or leasing, or investment in the United States the sum of three hundred and fifty-four thousand five hundred and eighty dollars and twenty cents ($354,580.20), being the amount of money expended annually by the United States for that branch of the postal service known as the 'Regulation wagon, mail-messenger, mail station, and transfer service'

in twenty-six cities only, not including the cities of Washington, D. C., Providence, R. I., Boston, Mass., and Detroit, Mich., as shown on page 112 of the report of the Postmaster-General, 1888.

"And I, the undersigned, hereby further propose and offer as aforesaid to license or lease to the United States for mail purposes only, as aforesaid, a right or rights, and upon reasonable and equitable terms, and for a reasonable consideration to be paid to me, the undersigned, my heirs, executors, administrators, or assigns therefor, by the United States, the amount thereof to be agreed upon by the United States and the undersigned James W. Beach (either by mutual agreement or by arbitration) a right or rights as aforesaid to construct and operate within said entire United States, or either of them (save and excepting therefrom said States of Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, Michigan, and the District of Columbia), one or more of said pneumatic conveyers or devices, said consideration to be based upon the mileage of the pneumatic tubes to be used, or upon a small percentage of the total (present) annual cost of the transportation of the United States mails within said United States.

"This proposal is made upon condition and the same shall not be binding upon the undersigned unless the United States shall by the Postmaster-General accept said propositions, or one of said propositions, and shall notify me, the undersigned, of said acceptance on or before the first day of August, A. D. 1893.

"In witness whereof I have hereunto set my hand and seal at Chicago, Illinois, this thirtieth day of August, A. D. 1892.

"JAMES W. BEACH. [SEAL].

"In presence of—

"EDWARD J. QUENNY (?)

"JACOB H. HOPKINS."

This proposal was accompanied with a description of the several devices described in letters patent No. 267,318 and No. 444,038, and with a written offer—"At our own expense to demonstrate in a positive and convincing manner that the said pneumatic devices will when in operation, do and perform all that is claimed in the accompanying 'Description' of said devices. . . . The undersigned is prepared to enter into a contract with the United States to construct or cause to be constructed (and operated, if so desired) one or more lines of said pneumatic devices in any city of the United States or between any cities or towns in the United States (whether near or far apart), upon terms and for a consideration to be mutually agreed upon, and upon executing said contract the undersigned will secure the performance of any undertaking which he may so enter into by a good and sufficient bond."

Seven other persons or companies answered the advertisement of the Postmaster-General for bids, and on September 15, 1892, he appointed a commission of three expert postal officials to examine into the merits of the pneumatic tubes and other systems so advertised for, and that commission reported to the Postmaster-General in writing on September 29, 1892, embodying in its report a brief schedule of the several propositions, and stating the general conditions or terms upon which the owners would place their respective devices at the disposal of the Government or submit the same to its experimental test. Among these were:

"No. 3. Pneumatic Transit Company of New Jersey. Pneumatic. Will put down line between main post-office in Philadelphia and substation at Third and Chestnut Streets, without cost to Government and without obligation to purchase or lease. After one year's trial will lease or will sell at cost if desired by Government."

"No. 8. James W. Beach and the Beach Pneumatic Conveyer Company, Chicago. Will make contract to

construct experimental line for a consideration to be mutually agreed upon. Will sell or lease. Experimental line to be in readiness in from four to twelve months from October 1, 1892."

The report contained the following specific recommendation:

"The offer known as 'No. 3,' submitted by the Pneumatic Transit Company of New Jersey, is to put down in the streets of Philadelphia, between the post-office and the East Chestnut street branch post-office, pneumatic tubes to connect these two offices, without expense to the Department, and without charge for one year's use of the same, and without liability thereafter. This offer is the best that has been received, and it is believed to be highly advantageous to the Department, because it will enable it to make an immediate and practical test of the pneumatic system. Your committee, therefore, desire to make the copy of the proposition No. 3, hereto attached, a part of this report, and they recommend prompt acceptance of the offer, that the test may be made without delay.

"It is worth while to add that in our judgment the placing of a line unconditionally at the disposal of the Department for practical, every day use will go far towards demonstrating, in a general way, the extent to which it may be made possible to substitute a tube system for the existing manner of performing transfer service within large cities, where time enters so largely into the necessities of the people.

"The committee desire, as well, to emphasize that in making recommendation that an arrangement be made with the Pneumatic Transit Company of New Jersey for the construction of an experimental line in Philadelphia, it does not wish to be understood as passing upon the merits of the system itself, that being a matter for consideration hereafter; in like manner it will be our purpose to give consideration to each one of the systems that have been submitted."

Pursuant to this report the Postmaster-General, on October 20, 1892, entered into a contract with the Pneumatic Transit Company of New Jersey, providing for the installation by that company at its own expense of a line of pneumatic tubes in the City of Philadelphia connecting the main post-office with the sub post-office and its operation for a period of one year after completion in such practical tests as the postmaster of Philadelphia and the Postmaster-General might see fit to conduct; the tests to be made without cost to the United States beyond the use of surplus steam from the boilers in the post-office building. The agreement provided that at the expiration of the year the Transit Company would lease said pneumatic tubes to the United States year by year, or would sell the same to the United States at cost, and would authorize the use by the United States of all the patented inventions in the said pneumatic tubes and devices connected therewith, by license, sale or assignment, as might then be agreed upon.

Similar contracts were entered into by the Post-office Department for like transportation of United States mail at Philadelphia, New York, Brooklyn, and Boston.

The Pneumatic Transit Company, which was incorporated under the laws of the State of New Jersey in 1892, had in its employ as an engineer one Birney C. Batcheller. He designed some of the terminal apparatus that was first used in Philadelphia; and a system of tubes and devices which carried mails pneumatically was constructed under his direction and supervision. While in the employ of said company said Batcheller extensively investigated the subject of pneumatics, and subsequently applied for and was granted letters patent for various improvements in pneumatic tube delivery devices. Ten of such patents were granted before the filing of Beach's petition in the Court of Claims, and they were used, applied and operated by the Pneumatic Transit Company. Twenty of such

patents were granted to Batcheller subsequent to the filing of Beach's petition, and these likewise were used, applied and operated by the Pneumatic Transit Company.

Among the specific findings of the Court of Claims are the following:

6. The evidence does not establish to the satisfaction of the court that plaintiff's letters patent were conveyed or delivered to the Postmaster-General.

9. The evidence does not establish to the satisfaction of the court that James W. Beach, the claimant herein, was the first inventor of the devices for pneumatic transportation used, operated, and conducted for the transportation of mail matter by persons contracting with the United States or by the agents of the United States.

10. The evidence does not establish to the satisfaction of the court that the letters patent issued to the claimant, James W. Beach, covered the same devices actually put into practical operation and used by the corporation which, under an act of Congress, contracted with the Postmaster-General for transmitting mail matter through pneumatic conveyors.

Upon the foregoing findings of fact the Court of Claims decided as a conclusion of law that the claimant was not entitled to recover, and that his petition should therefore be dismissed.

Mr. James W. Beach pro se.

Mr. Assistant Attorney General Thompson, with whom *Mr. Walter H. Pumphrey* was on the brief, for the United States.

MR. JUSTICE PITNEY, after stating the case as above, delivered the opinion of the court.

The appellant, by his amended petition, asked for a recovery against the Government in the sum of twenty

million dollars and interest, as the purchase price upon an alleged assignment and transfer in the year 1893 of certain inventions pertaining to pneumatic transportation for which letters patent had been theretofore issued to him as mentioned in the findings. His first insistence was and is that these inventions and patents had been purchased by the Postmaster-General under an express agreement to pay him the sum mentioned as consideration. In the alternative he insisted and now insists that at least the Government, with his consent, entered into the use and enjoyment of his devices and letters patent in the year 1893, and has ever since then used and enjoyed them, and ought to pay him their fair value, which he places at twenty million dollars. The facts from which the alleged contract of purchase (express or implied) is sought to be deduced are set forth in the findings of fact above referred to. These findings are criticised by the appellant on the ground that they constitute a mere recital of the evidence, instead of an ascertainment of the ultimate facts. This criticism, under the circumstances of the present case, is captious. The court has set forth the documents upon which alone must rest appellant's contention of an express contract, if that contention have any substantial basis; and has likewise set forth the history of the transactions from which, if at all, an agreement must be implied, if there was no express contract. At the same time the court has expressly found that "The evidence does not establish to the satisfaction of the court that plaintiff's letters patent were conveyed or delivered to the Postmaster-General;" and has made a similar negative finding respecting the appellant's claim to be the first inventor of the devices for pneumatic transportation used, operated and conducted for the transportation of mail matter by persons contracting with the United States or by the agents of the United States; and a similar negative finding respecting his claim that his letters patent "covered the

same devices actually put into practical operation and used by the corporation which under an act of Congress contracted with the Postmaster-General for transmitting mail matter through pneumatic conveyors."

A fundamental obstacle stands in the way of appellant's claim, whether it be rested upon an express or an implied purchase of pneumatic devices or of patented inventions relating thereto. We refer to the lack of power on the part of the Postmaster-General to contract in behalf of the Government of the United States for such a purchase. Sec. 6 of the post-office appropriation act of July 13, 1892 (27 Stat. 145, c. 165), provided merely—"that the Postmaster-General is hereby authorized and directed to examine into the subject of a more rapid dispatch of mail matter between large cities, and post-office stations and transportation terminals located in large cities, by means of pneumatic tubes or other systems, and make report upon the expense, cost and advantages of said systems when applied to the mail service of the United States, and the sum of ten thousand dollars is hereby appropriated therefor."

Manifestly the appropriation was intended for the purpose of investigation and report, and did not extend to authorizing such a purchase as that which the appellant alleges.

Of this limitation upon the authority of the Postmaster-General the appellant had plain notice at the inception of his dealings with that official. Not only did the advertisement of July 26, 1892, begin by referring to the above-recited clause of the appropriation act, but it contained, near its close, this express declaration: "The Postmaster-General has no authority in law to contract for the expenditure of money for the use of or purchase of any such invention, nor is there any existing appropriation out of which the cost of the same could be paid."

Appellant insists that under other acts of Congress the

Postmaster-General had authority to purchase the inventions and devices in question. Reference is made to § 3965, Rev. Stat., enacting that "The Postmaster-General shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper." This is one of the sections that prescribe the general duties of the Postmaster-General, and cannot be fairly treated as authority for making the alleged contract of purchase. Successive appropriation acts are referred to. Act of June 9, 1896 (29 Stat. 313, 315, c. 386), authorizing the Postmaster-General, in his discretion, to use not exceeding $35,000 in the transportation of mail by pneumatic tube or other similar devices, contains no authorization of purchase. Act of March 3, 1897 (29 Stat. 644, 646, c. 385), authorizes the use of not exceeding $150,000 in the transportation of mail by pneumatic tube or other similar devices, "by purchase or otherwise." But this was enacted more than four years after the last transactions (so far as the record shows) between the appellant and the Postmaster-General, out of which it could possibly be claimed that any contract, express or implied, had arisen. For like reasons, subsequent statutes that are referred to (Act of June 13, 1898, 30 Stat. 440, 442, c. 446; Act of March 1, 1899, 30 Stat. 959, 963, c. 327; Act of June 2, 1900, 31 Stat. 252, 258, c. 613; Act of July 1, 1898, 30 Stat. 597, 615, c. 546; Act of March 3, 1899, 30 Stat. 1074, 1092, c. 424) must be rejected. They indicate that pneumatic tube service was in operation in Philadelphia, New York City, Brooklyn, Boston, and perhaps elsewhere; but they have no reference to any transactions between the Postmaster-General and the appellant.

But if the obstacle arising out of the actual and avowed want of authority on the part of the Postmaster-General could be overcome, the appellant's case is still fatally

weak upon the question whether any contract was in fact made, either expressly or by implication from the conduct of the parties.

The contention that there was an express contract rests upon the fact that the Postmaster-General retained the appellant's proposal without in terms rejecting it. The argument is untenable for several reasons, some of which may be stated.

First, it ignores the fact that the proposal was submitted in response to an advertisement which plainly stated that the proposals were desired for the purpose of investigation and estimate merely, and that the Postmaster-General had no authority to contract for the expenditure of money for the use or purchase of any such invention.

Secondly, it treats the appellant's proposal as an assignment *in presenti* of his inventions and patents to the United States, and nothing else. It was not, either in form or substance, an assignment, but (so far as it had reference to a sale), merely purported to state the terms upon which Beach proposed and offered to sell, and manifestly contemplated that something should be done on each side before the inventions should in fact become the property of the United States. It is significant that one of the terms of the proposal was: "This proposal is made upon condition and the same shall not be binding upon the undersigned unless the United States shall by the Postmaster-General accept said propositions, or one of said propositions, and shall notify me, the undersigned, of said acceptance on or before the first day of August, A. D. 1893."

Thirdly, the proposal was not a mere offer to sell the inventions and patents. It contained four several propositions, acceptance of either one of which involved rejection of the remaining three; that is to say, Beach offered (a) to invest in the United States all of his rights under

the patents in all States and Territories excepting Maine, New Hampshire, Connecticut, Rhode Island, Michigan, and the District of Columbia, in consideration of $800,000 per annum, this offer being without limit as to the use to which the patented devices should be put; (b) to assign and transfer to the United States all rights in the patents in all the States and Territories saving those just mentioned for twenty million dollars, (this of course contemplated an absolute sale); (c) to invest in the United States all his rights under the two patents ("the said pneumatic devices or conveyors to be used solely and only for the purpose of collecting and transmitting the United States mails, and for no other purpose") in the entire United States excepting the States already mentioned and the District of Columbia, in consideration of an annual payment of $354,580.20, and (d) to "license or lease to the United States for mail purposes only" the right to construct and operate his pneumatic conveyors anywhere in the United States, excepting the States already mentioned and the District of Columbia, "upon reasonable and equitable terms, and for a reasonable consideration to be paid to me . . . the amount thereof to be agreed upon by the United States and the undersigned, James W. Beach, (either by mutual agreement or by arbitration), . . . said consideration to be based upon the mileage of the pneumatic tubes to be used, or upon a small percentage of the total (present) annual cost of the transportation of the United States mails within said United States." It is evident that a retention of the proposal without dissent could not be deemed an acceptance of proposition (b) any more than of (a), or of (c), or of (d); and so the act of retention (if there were no obstacle arising out of the want of authority on the part of the Postmaster-General) cannot be treated as an acceptance of either one of the four several propositions.

For these and other reasons, the Court of Claims was

clearly right in holding that the evidence did not establish that the letters patent were conveyed or delivered to the Postmaster-General.

The theory of implied contract is likewise untenable. In the first place, the want of statutory authority on the part of the Postmaster-General to represent the Government in making an express contract is equally fatal to the theory of an implied contract. For it is fundamental that he who is without authority to bind his principal by an express contract cannot be held to have done so by implication.

Another and sufficient answer is that the appellant has failed to show any use by the Postmaster-General or his successors of the patented inventions or devices of the appellant, or to show that the contractors or agents of the Government have made any use of them. His case here fails because he does not show that the inventions or devices used are those covered by his patents.

Therefore the Court of Claims correctly held that the appellant had not made out a case of contract.

Judgment affirmed.

ROSENTHAL *v.* PEOPLE OF THE STATE OF NEW YORK.

ERROR TO THE COUNTY COURT OF MONROE COUNTY, IN THE STATE OF NEW YORK.

No. 28. Argued November 5, 1912.—Decided December 2, 1912.

The prohibition of the Fourteenth Amendment against abridgment of privileges or immunities of a citizen of the United States relates only to such privileges and immunities as pertain to citizenship of the United States as distinguished from state citizenship. *Slaughter House Cases*, 16 Wall. 36.

A State may, in the exercise of its police power, classify separately particular kinds of personal property which the legislature considers more susceptible of theft than other property.

It is not unreasonable or arbitrary to require dealers in junk to make diligent inquiry to ascertain that persons selling to them wire cable, iron &c. belonging to railroads or telegraph companies have a legal right to do so.

Dealers who provide an important and separate market for a particular class of stolen goods may be put in a class by themselves, and so as to dealers in junk.

One not included in a class established by a police statute or who is not injuriously affected by the classification cannot be heard to attack the statute on the ground that the classification denies equal protection of the law.

A State is not required to go as far as it may in establishing a police regulation; the entire field of proper legislation need not be covered in a single act.

Section 550 of the Penal Code of New York as amended in 1903, prohibiting dealers in junk from buying wire, copper, &c., used by, or belonging to a railroad, telephone or telegraph company without first ascertaining by diligent inquiry that the person selling had a legal right to do so, is not unconstitutional under the Fourteenth Amendment either as depriving junk dealers of their property without due process of law or denying them equal protection of the law by an arbitrary classification of junk dealers or of the property specified.

Whether a state law is unconstitutional as *ex post facto* by reason of the construction given it by the state court not considered in this case because no such point was raised in the court below or covered by assignments of error in this court.

197 N. Y. 394, affirmed.

THE facts, which involve the constitutionality of a statute of New York relating to dealers in junk, are stated in the opinion.

Mr. Percival D. Oviatt for plaintiff in error:

Chapter 326 of the Laws of 1903, is unconstitutional even as interpreted by the New York Court of Appeals.

The laws relating to criminally receiving stolen property as they existed prior to 1903, were adequate to pro-

tect against the evils involved. Chapter 308, Laws of 1903, compels every junk dealer to obtain a license. See *People* v. *Wilson*, 151 N. Y. 403; *People* v. *Dowling*, 84 N. Y. 478, 485.

See also § 290, subd. 6 of the Penal Code providing that no junk dealer shall receive or purchase anything from a child under sixteen years of age; Laws of 1907, Chapter 755, New Charter of Rochester. The statute cannot be constitutional as to cities of the first class, and unconstitutional as to all other places.

There is no justification for the Court of Appeals to say that the materials are usually of such shape and form as to indicate use or ownership.

The statute applies only to dealers in metals, etc., and is class legislation based upon illogical and arbitrary distinctions. *Re Jacobs*, 98 N. Y. 106; *People* v. *Marx*, 99 N. Y. 377; *Madden* v. *Dycker*, 72 App. Div. 308; *Schnaier* v. *Navarre Hotel & Importation Co.*, 182 N. Y. 83; *Wright* v. *Hart*, 182 N. Y. 330; *Buffalo* v. *Linsman*, 113 App. Div. 584; *Fisher Co.* v. *Woods*, 187 N. Y. 90; *People* v. *Williams*, 189 N. Y. 131; *Tyroler* v. *Warden*, 157 N. Y. 116; *Lochner* v. *New York*, 198 U. S. 45, 56; *Cotting* v. *Godard*, 183 U. S. 79, 107; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Josma* v. *Western Steel Car Co.*, 249 Illinois, 508; *Chicago* v. *Lowenthal*, 242 Illinois, 404.

The case at bar involves any dealer in metals, not only junk dealers. *Fisher Co.* v. *Woods*, 187 N. Y. 90; *People* v. *Hawkins*, 157 N. Y. 1; *Phillips* v. *Raynes*, 136 App. Div. 417; *People* v. *Beattie*, 96 App. Div. 383.

The statute is solicitous concerning the property of only railroad, telephone, gas and electric companies, and is class legislation based upon illogical and arbitrary dictinctions.

This legislation is as offensive as that which was de-

clared unconstitutional in *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931; *Wright* v. *Hart, supra; Lochner* v. *New York*, 198 U. S. 45, 56.

The motive for passing the statute in the case at bar was not to protect all persons similarly situated, owning the property described, but it was to protect only the specific corporations named without regard to the welfare of the other owners of the same character of property. *Cotting* v. *Godard*, 183 U. S. 79, 109; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *People* v. *Hawkins*, 157 N. Y. 1.

The incident of who owned the property can have no bearing upon the guilt or innocence of the purchaser. If the property is of such a nature that it is peculiarly susceptible to theft, it is the nature of the property and not the owner of it which constitutes the fundamental and logical distinction. *Phillips* v. *Raynes*, 136 App. Div. 417, 425; *People* v. *Marcus*, 110 Am. Dec. 255; *Appel* v. *Zimmerman*, 102 Am. Dec. 103; *People* v. *Beattie*, 96 Am. Dec. 383, 392; *In re Van Horne*, 70 Atl. Rep. 986.

The statute required the plaintiff in error to determine a legal question which was not a question as to whether the property had been stolen, but the question as to the legal right of the seller to sell it. *Lawton* v. *Steel*, 119 N. Y. 226; *Cotting* v. *Godard*, 183 U. S. 79; *United States* v. *Reese*, 92 U. S. 214; *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150; *Rodgers* v. *Coler*, 166 N. Y. 1; *Board of Commissioners* v. *Merchant*, 103 N. Y. 143, 148; *People* v. *Gillson*, 109 N. Y. 389, 400.

In the case at bar, the dealer's power to purchase is restricted by the absurd condition of making him ascertain a legal right. Such legislation is not necessary because if legislation of this character were necessary for the common welfare it should apply to all persons about to purchase such property, and to all owners of such property without restriction; it should compel an inquiry, not

as to a legal right of the seller to sell, but as to whether or not the property had, in fact, been the subject of a larceny.

The construction placed upon this statute by the Court of Appeals of the State of New York is clearly erroneous. In this situation this court may interpret the statute for itself. Under a proper interpretation the statute is unconstitutional for other reasons than those already argued.

In a criminal statute, the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise, there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. *United States* v. *Reese*, 92 U. S. 214; *Lochner* v. *New York*, 198 U. S. 45; *Yick Wo* v. *Hopkins*, 118 U. S. 355; *Baldwin* v. *Frank*, 120 U. S. 680; *Burgess* v. *Seligman*, 107 U. S. 21.

The constitutional rights of the plaintiff in error either were or were not violated at the time he was sentenced upon his plea of guilty, and when his motion in arrest of judgment was denied. At that time there was no state decision interpreting this statute. *Douglas* v. *Pike Co.*, 101 U. S. 679; *United States* v. *Reese*, 92 U. S. 215; *State Bank* v. *Knoop*, 16 How. 369; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96. See also *Louisville Trust Co.* v. *City of Cincinnati*, 76 Fed. Rep. 296; *Loeb* v. *Columbia County*, 91 Fed. Rep. 37.

Mr. Freeman F. Zimmerman for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

The plaintiff in error pleaded guilty to an indictment charging him with "the crime of criminally receiving stolen property," in that he, being a dealer in and collector of junk, metals and second-hand materials, did feloniously

buy and receive, from persons named, certain copper wire, "the same then and there consisting of copper wire used by and belonging to a telephone company, to wit, used by and being the goods, chattels and personal property of the Bell Telephone Company, of Buffalo, . . . then lately stolen, taken and carried away from the possession of the said Bell Telephone Company, . . . without ascertaining by diligent inquiry that the said persons so selling and delivering the same had a legal right to do so."

The indictment was founded upon Chap. 326 of the Laws of 1903 of the State of New York, amending § 550 of the Penal Code. The section as amended reads as follows:

"SEC. 550. Criminally receiving property.—A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation has been committed within the state, whether such property were stolen or misappropriated within or without the state, [*or who being a dealer in or collector of junk, metals or second-hand materials, or the agent, employé, or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telephone, telegraph, gas or electric light company without ascertaining by diligent inquiry, that the person selling or delivering the same has a legal right to do so,*] is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison for not more than

five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment."

The words inclosed in brackets were added by the amendment of 1903, which made no other change in the section. The section as amended was reënacted in the Penal Code as § 1308.

Having pleaded guilty, the plaintiff in error moved in arrest of judgment, upon the ground of the unconstitutionality of the amendment of 1903, and this motion having been denied, sentence of fine and imprisonment was imposed, whereupon he took an appeal to the Appellate Division, and from an adverse ruling in that court he appealed to the Court of Appeals, which court sustained the statute against the constitutional objections and affirmed the judgment of conviction. 197 N. Y. 394.

The record having been remitted to the county court, the present writ of error was taken. The errors relied upon are that the courts of the State of New York erred, because they ought to have decided that the amendment of 1903 to § 550 of the Penal Code was in conflict with the Fourteenth Amendment, in that (a) it abridged the privileges and immunities of the plaintiff in error; (b) deprived him of his liberty and property without due process of law, and (c) denied to him the equal protection of the laws.

No serious argument was made to support the contention that the act in any way abridged the privileges or immunities of the plaintiff in error as a citizen of the United States. This part of the prohibition of the Fourteenth Amendment refers only to such privileges and immunities as pertain to citizenship of the United States, as distinguished from state citizenship. *Slaughter House Cases*, 16 Wall. 36, 74, 80. We are unable to see that the statute under consideration, or its enforcement in the case at hand, even if the act be fairly open to any or all of the criticisms that are made upon it, abridges in the

least any privilege or immunity that arises out of the national citizenship of the plaintiff in error.

The argument is thus narrowed to a consideration of the statute in the light of the "due process of law" and "equal protection" clauses.

The New York Court of Appeals in the present case construed the amendment of 1903 as applying only to stolen property, and as putting upon the dealer in junk, metal or second-hand materials, not the burden of ascertaining at his peril that the person selling or delivering the wire or other property specified, has a legal right to do so, but only the duty of making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has such legal right.

Counsel for the plaintiff in error argues, first, that the act in question is unconstitutional even as thus interpreted; and this on the grounds that the previous laws relating to criminally receiving stolen property, were adequate to protect against the evils involved and that the act of 1903 is unreasonable and oppressive and an undue interference with the liberty of contract; that since the act applies only to dealers in metals, etc., it is class legislation, based upon arbitrary distinctions; and that the statute protects the property only of railroad, telephone, gas and electric companies, and for this reason likewise is based upon arbitrary distinctions.

In support of this argument, counsel points out that, without the amendment of 1903, the Penal Code provides that anyone who buys or receives property, knowing it to be stolen, is guilty of a felony; that anyone who conceals or withholds or aids in the concealment or withholding of such property is guilty of a felony; that the decisions of the courts of New York hold that actual knowledge of the fact that the property is stolen is unnecessary, and that anything in the circumstances that would put an honest or prudent man upon inquiry is sufficient to war-

rant a conviction. *People* v. *Dowling*, 84 N. Y. 478, 485; *People* v. *Wilson*, 151 N. Y. 403. It is also pointed out that chapter 308 of the Laws of 1903 compels every junk dealer (except in cities of the first class), to obtain a license, provides that when such a dealer purchases any pig iron, pig metal, copper wire, or brass car journals, he shall cause a statement to be subscribed by the seller as to when, where, and from whom he obtained the property, which statement must be filed with the chief of police; and that when a junk dealer purchases the property described, he must keep such purchase absolutely separate and distinct, without change or mutilation, for a period of five days after the purchase, and must tag it with a tag bearing the particulars of the purchase. And that all cities of the first class have dealt with the subject-matter through the means of local ordinances at least as comprehensive as the statute just mentioned.

Counsel, indeed, concedes the abundant right of the legislature to regulate the junk business, and admits that such regulations as those just referred to are quite within the legislative power of the State.

This concession is, we think, very properly made; and, this being so, there is little ground left for an attack upon the amendment of 1903 because of its alleged unreasonable and arbitrary requirement that a dealer in or collector of junk, metals, or second-hand materials, who buys or receives any stolen wire, cable, copper, lead, solder, iron, or brass, used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, shall make diligent inquiry to ascertain that the person selling or delivering it has a legal right to do so.

When it is conceded that such a dealer may be properly subjected to punishment as a criminal if he receives stolen property without actual knowledge that it has been stolen, and merely because charged with notice of circumstances such as would have put an honest or prudent

man upon inquiry, it needs little argument to vindicate legislation with respect to particular kinds of personal property that the legislature in its wisdom presumably deemed to be more susceptible of theft than other property, when that legislation but adds the further requirement of diligent inquiry by the dealer with respect to the right of the seller.

It is urged as a criticism that the statute directs the junk dealer's inquiry to the question of the legal right of the seller to sell, rather than to the question of an original larceny. It ought to be unnecessary to say that if goods have in fact been stolen, a diligent inquiry into the right of the present possessor to make sale or delivery of them will very surely tend to disclose the larcenous origin of his title. Indirect questions in such a case will very probably bring out the truth as readily and as surely as the plump inquiry—"Did you steal these goods?" Or, at least, the legislature might so presume. For of course all such matters rest in legislative discretion.

Counsel suggests that diligent inquiry by a junk dealer respecting the legal right of one offering certain wire or other goods for sale might lead to perplexing questions that only a court of last resort could properly determine. The obvious answer is that a method of inquiry that would bring to light, in rare instances, even the occult and doubtful point in a vendor's title, would, if systematically adhered to, be reasonably sure in a greater number of instances to develop the fact that the goods under investigation had been acquired by theft.

We have said enough to indicate the character of the arguments employed in the effort to show that the act of 1903 is wholly arbitrary and constitutes so groundless an interference with the citizen's liberty of contract as to bring it within the denunciation of the due process of law clause of the Fourteenth Amendment. It seems to us that the object of the legislation is well within the

legitimate bounds of the police power of the State and sustainable upon the principles discussed in *Mugler* v. *Kansas*, 123 U. S. 623, 661, etc., of which more recent applications are to be found in *Booth* v. *Illinois*, 184 U. S. 425, 429, and *Lemieux* v. *Young*, 211 U. S. 489. See also *Chicago, B. & Q. Ry. Co.* v. *McGuire*, 219 U. S. 549, 568.

Nor can the act in question be deemed to conflict with the "equal protection" clause because it places junk dealers, etc., in a class by themselves. The argument under this head is that if property of the kinds mentioned in the act is peculiarly susceptible of theft, there is no reason that all persons should not be subjected to the same rules with reference to its purchase. This needs no answer beyond a reference to the well-known fact, alluded to by the New York Court of Appeals in its opinion herein, that junk dealers provide an important market for stolen merchandise of the kinds mentioned, and that because of their experience they are peculiarly fitted to detect whether property offered is stolen property. Plainly it cannot be said that the classification rests on no reasonable basis. It is unnecessary to rehearse the grounds upon which rests the authority of the States to resort to classification for purposes of legislation. The citation of a few recent illustrative cases will obviate extended discussion. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562; *Louisville & Nashville R. R.* v. *Melton*, 218 U. S. 36, 52; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78.

The fact that the act of 1903 has reference to the property of only railroad, telephone, gas, and electric companies, furnishes no ground for the plaintiff in error to invoke the "equal protection" clause of the Fourteenth Amendment. The failure of the legislature to extend the protection of the act to the like kinds of property when owned by manufacturers of equipment for railroads, telephone and telegraph lines, as well as when owned by the

companies operating such lines; or the failure to include the owners of blast furnaces and brass foundries, or other classes who, as claimed by counsel, are liable to losses by theft of articles of the like kinds, affords no footing for an attack by plaintiff in error upon the constitutionality of the act, for the reason that he does not bring himself within any of the classes that, according to the argument, are peculiarly susceptible to losses of the kind that the statute is designed to prevent, nor does he show that he has suffered any injury by reason of the failure of the legislature to extend the protection of the act to other classes of owners. *Tyler* v. *Judges*, 179 U. S. 405, 409; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Southern Railway Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550.

So far, therefore, as plaintiff in error is concerned, the legislature has simply not extended the scope of the act so far as it might properly have done. The argument under this head concedes, and must concede, that the act is beneficial as far as it goes, the complaint being that it does not go far enough. But the Federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment.

The Court of Appeals, in the case before us, said with respect to this topic: "The legislature is presumed to have been familiar with current history and the decisions of the courts, which show that property of a certain kind, such as copper, brass, iron, etc., is frequently stolen from railroad, telegraph, and similar corporations, which cannot adequately protect it because it is scattered through the country along extensive lines of transportation or communication, and which is exposed to view and caption by the evil minded, who find their best market in the shops of certain junk dealers."

If the act required any defense against the criticism now under consideration, this expression would suffice.

It remains only to notice the second principal contention of plaintiff in error, which is that the construction placed upon the act of 1903 by the Court of Appeals is clearly erroneous, and that the situation is such that this court ought not to hold itself bound by that construction.

It is ingeniously argued that since the statute had never been judicially construed until the decision of the Court of Appeals in this case, and since that court (erroneously, it is asserted) injected into the act by construction two elements that are said not to be apparent from a literal reading—to wit, that the statute applies only to stolen property, and that the dealer need not ascertain the legal right of the seller, but need only make diligent inquiry to ascertain the same, the plaintiff in error is aggrieved by what is called the "judicial amendment" of the statute.

Although not distinctly invoking the prohibition of *ex post facto* laws, as contained in Art. I, § 10, cl. 1, of the Federal Constitution, the argument, if it have any basis, must be rested upon that prohibition.

It is sufficient to say that no such point appears to have been raised in the court below, although it might have been raised by an application for rehearing. Nor is any such point covered by the assignments of error in this court.

Judgment affirmed.

ZAKONAITE *v.* WOLF, JAILOR OF THE CITY OF ST. LOUIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 53. Argued November 14, 1912.—Decided December 2, 1912.

The evidence in this case, upon which the order of deportation of an alien on the ground that she was a prostitute and was found practic-

ing prostitution within three years after her entry into the United States was based, being adequate to support the conclusions of fact of the Secretary of Commerce and Labor, and there having been a fair hearing, those findings are not subject to review by the courts.

The authority of Congress to prohibit aliens from coming within the United States includes the authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the country depends.

A proceeding to enforce regulations under which aliens may continue to reside within the United States is not a criminal proceeding within the meaning of the Fifth and Sixth Amendments.

Congress may properly devolve a proceeding to enforce regulations under which aliens are permitted to remain within the United States upon an executive department or subordinate officials thereof and may make conclusive the findings of fact reached by such officials after a summary hearing, if fair.

Section 3 of the act of February 20, 1907, 34 Stat. 898, c. 1134, providing for deportation of alien prostitutes within three years after entry into the United States and providing a summary proceeding for determining the fact by the Secretary of Commerce and Labor, does not violate either the Fifth or Sixth Amendment by depriving the alien of her liberty without due process of law or by denying her a jury trial.

THE facts are stated in the opinion.

Mr. L. G. Pope, with whom *Mr. Chas. F. Joy* and *Mr. Henry B. Davis* were on the brief, for appellant.

Mr. Assistant Attorney General Harr for appellee.

Memorandum opinion, by direction of the court, by MR. JUSTICE PITNEY.

The appellant, having been arrested and held in custody under warrants of arrest and deportation issued by the Acting Secretary of Commerce and Labor under the Immigration Act of February 20, 1907, sought to be discharged upon *habeas corpus* issued out of the Dis-

trict Court, and, that court having upon hearing ordered the dismissal of the writ, she prosecutes this appeal.

From the return and supplemental return of the respondent it appears that the appellant is an alien and that as the result of a hearing and re-hearing conducted in compliance with Rule 35, paragraph E of the Rules and Regulations of the Department of Commerce and Labor, she was found to be in the United States in violation of § 3 of the act referred to, and subject to deportation, in that she was a prostitute, and had been found practicing prostitution within three years after her entry into the United States.

In her behalf it was contended in the court below, and is here contended, first, that there was no evidence before the Secretary of Commerce and Labor sufficient to warrant the findings of fact upon which the order of deportation was based; and, secondly, that § 3 of the act of February 20, 1907 (34 Stat. 898, 899, c. 1134), which provides that "any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this Act,"—is unconstitutional because violative of the guaranties that no person shall be deprived of life, liberty or property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, as contained in the Fifth and Sixth Amendments.

As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's con-

clusion of fact. That being so, and the appellant having had a fair hearing, the findings are not subject to review by the courts.

With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; *United States* v. *Zucker*, 161 U. S. 475, 481; *Wong Wing* v. *United States*, 163 U. S. 228, 237; *Turner* v. *Williams*, 194 U. S. 279, 289; *Chin Yow* v. *United States*, 208 U. S. 8, 11; *Tang Tun* v. *Edsell*, 223 U. S. 673, 675; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468.

The appellant raises some other constitutional objections, viz.: that the Immigration Act vests in the Federal authorities the power to try an immigrant for a violation of the penal laws of the State of which he has become a resident, and so interferes with the police powers of the State; that the act vests judicial powers in an executive branch of the Government; that it violates the constitutional guaranty of the privilege of the writ of *habeas corpus*, and the like. These are without substance, and require no discussion.

Final order affirmed.

NATIONAL SURETY COMPANY *v.* ARCHITECTURAL DECORATING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 425. Submitted October 28, 1912.—Decided December 2, 1912.

While, in a general sense, the laws in force at the time the contract is made enter into its obligation, the parties have no vested rights in the particular remedies or modes of procedure then existing. *Water Works Co.* v. *Oshkosh*, 187 U. S. 437.

There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. *Bernheimer* v. *Converse*, 206 U. S. 516.

Where, as the state court has held in this case, the requirement that a preliminary notice that a third party intends to avail of the benefit of a bond given for performance of a contract is a condition precedent to an action on the bond, legislation altering the period within which such notice must be given affects the remedy and not the contract itself and does not amount to an impairment of the obligation of the bond within the contract clause of the Federal Constitution.

Chapter 413 of the General Laws of Minnesota of 1909, extending the time within which third parties intending to avail of the benefit of a bond given for completion of public buildings must serve notice of intention so to do, effected merely a change in remedy without substantial modification of the obligation of the contract and is not an unconstitutional impairment thereof.

115 Minnesota, 382, affirmed.

THE facts, which involve the constitutionality of a statute of Minnesota relating to enforcement of claims under building bonds, are stated in the opinion.

Mr. Jed L. Washburn, *Mr. W. D. Bailey* and *Mr. Oscar Mitchell* for plaintiff in error:

By the common law as interpreted by the Minnesota Supreme Court at the time the bond in question was given, no action could have been maintained by the Decorating Company against plaintiff in error on the bond sued on.

The right of action given is statutory in its origin, and was conditioned on giving the proper notice. *Park Brothers & Company* v. *Sykes*, 67 Minnesota, 153; *Eidsvik* v. *Foley*, 99 Minnesota, 468; *Breen* v. *Kelly*, 45 Minnesota, 352.

The statutes in force at the time the bond was executed and delivered, in so far at least as they conditioned the surety's liability, became a part of plaintiff in error's contract, including the requirement for notice therein, as fully in all respects as if such requirement for notice had been set out at length therein. *Grant* v. *Berrisford*, 94 Minnesota, 45; *United States* v. *Quincy*, 4 Wall. 535; *Walker* v. *Whitehead*, 16 Wall. 314; *Edwards* v. *Kearzey*, 96 U. S. 595; *McCracken* v. *Hayward*, 2 How. 608; *Barnitz* v. *Beverly*, 163 U. S. 118; *Bradley* v. *Lightcap*, 195 U. S. 1; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385.

The requirement for notice in the statute at the time the bond was executed and delivered became a part of the contract thereafter existing between the plaintiff in error and the Decorating Company, and was a condition precedent to liability and no part of the remedy. *Grant* v. *Berrisford*, 94 Minnesota, 45; *The Harrisburg*, 119 U. S. 199; *Selma R. & D. R. Co.* v. *Lacey*, 49 Georgia, 106; *Hamilton* v. *Hannibal & St. J. R. Co.*, 39 Kansas, 56; *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Lambert* v. *Ensign Co.*, 42 W. Va. 813; *Theroux* v. *N. P. Ry. Co.*, 64 Fed. Rep. 84; *Babcock* v. *N. P. Ry. Co.*, 154 U. S. 190; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120; *Simerson* v. *St. Louis & S. F. R. Co.*, 173 Fed. Rep. 612; *Pohlman* v. *Railway Co.*, 182 Fed. Rep. 492; *Lange* v. *Railway Co.*, 126 Fed. Rep. 338; *Veginan* v. *Morse*, 160 Massachusetts, 143; *Healey* v. *Geo. F. Blake Mfg. Co.*, 180 Massachusetts, 270; *McRae* v. *Railway Co.*, 199 Massachusetts, 418; *Dolenty* v. *Broadwater* (Montana), 122 Pac. Rep. 191; *Hudson* v. *Bishop*, 32 Fed. Rep. 519; *S. C.*, 35 Fed. Rep. 820; *United States* v. *Winkler*, 162 Fed. Rep. 397; *United States* v.

Boomer, 183 Fed. Rep. 726; *Railway Co.* v. *Hine*, 25 Oh. St. 629; *Denver & Rio Grande* v. *Wagner*, 167 Fed. Rep. 75; *Christie-Street Commission Co.* v. *United States*, 126 Fed. Rep. 991, 996.

The requirement for notice being a condition precedent to the right of action, and no part of the remedy, could not be dispensed with by any act of the legislature, and chap. 413 of the Laws of 1909 dispensing with this notice, if applied to the bond in question, was unconstitutional as impairing the obligation of plaintiff in error's contract. *Miller* v. *Stewart*, 9 Wheat. 680; *United States* v. *Freel*, 186 U. S. 309; *Governor* v. *Lagow*, 43 Illinois, 141; *People* v. *Tompkins*, 74 Illinois, 487; *Grocer's Bank* v. *Kingman*, 16 Gray, 476; *Schuster* v. *Weiss*, 114 Missouri, 171; *King County* v. *Ferry*, 5 Washington, 554; *Green* v. *Biddle*, 8 Wheat. 1, 84; *Bank* v. *Sharp*, 6 How. 326; *Golden* v. *Prince*, 10 Fed. Cases, No. 544; *Louisiana* v. *New Orleans*, 102 U. S. 203.

Mr. Arcadius L. Agatin for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This is an action to recover damages for the breach of a bond made by the plaintiff in error as surety together with one Henricksen as principal, given to a certain school district of the State of Minnesota, conditioned that Henricksen should pay all just claims for work, materials, etc., furnished for the completion of a school building, for the construction of which he had made a contract with the district; the bond being given, according to its own recitals, for the use of the school district and of all persons doing work or furnishing materials under the contract. The contract and bond were made in the year 1908. The bond was executed and delivered pursuant to the provisions of the Minnesota statutes found in Rev. Laws

Minn. 1905, §§ 4535 to 4539, inclusive, which in effect require every public corporation of the State, on entering into a contract for the doing of any public work, to take a bond for its own use and for the use of all persons furnishing labor or material under or for the purpose of the contract, and which entitle any person so furnishing labor or material to maintain an action upon the bond, under certain conditions.

The defendant in error, during the months of July and August, 1909, performed certain services and furnished certain materials to Henricksen for use in carrying out his contract, for which a sum exceeding one thousand dollars remained due and unpaid, and to recover the amount so due this action was brought.

By § 4539, above referred to, which was in force at the time the contract for building the school was made and the bond given, it was enacted that—"No action shall be maintained on any such bond unless within ninety days after performing the last item of work, or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909, this section was amended by chapter 413, G. L. 1909, p. 501, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper public authorities," instead of within ninety days "after performing the last item of work or furnishing the last item of skill, tools, machinery, or material," and further amended by requiring the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues."

It will be observed that this change in the law went

into effect before the defendant in error performed the services and furnished the materials upon which the present action is based.

Defendant in error did not give notice to plaintiff in error in time to comply with § 4539, R. L. 1905, but did give such notice in time to comply with the amended act, if that be the applicable law.

The Supreme Court of the State of Minnesota in the present case held that the act of 1909 controlled, although passed after the bond in question was given, overruling the contention of plaintiff in error that the statute as so construed impairs the obligation of the contract contained in the bond, and is therefore contrary to § 10 of Art. I of the Federal Constitution. 115 Minnesota, 382.

The only question that need be here considered is whether the act of 1909, as thus construed, does impair the obligation of the contract.

Sections 4535–4539, R. L. 1905, originated in chap. 354 of the General Laws of 1895 and chap. 307 of the General Laws of 1897. Prior to this legislation the Supreme Court of Minnesota had held in *Breen v. Kelly* (1891), 45 Minnesota, 352, that although a municipal corporation, having authority to cause certain public work to be done and to make contracts for the doing of it, probably had implied authority to take security for its own protection, it had no authority to take security for third persons nor capacity to act as trustee in a contract made for their benefit, without express legislative authority; and that such a bond, although voluntarily given, was void. The same principle was adhered to in *Park Bros.* v. *Sykes* (1897), 67 Minnesota, 153.

By chap. 354 of the Laws of 1895, which first created the statutory right of action in favor of third persons upon such a bond, no notice by the third person to the principal or sureties was required as a condition precedent to his right to sue. He was merely obliged to bring his

action within one year after the cause of action accrued. Notice by the plaintiff to the principal and sureties was first required by chap. 307 of the Laws of 1897, the third section of which contained the same provisions that were afterwards embodied in the Revision of 1905, as § 4539, above quoted.

The Supreme Court of Minnesota, in the year 1904, in *Grant* v. *Berrisford*, 94 Minnesota, 45, 49, construed G. L. 1897, chap. 307, § 3, as follows: "The provision in the general law requiring notice within ninety days after the last item of labor or materials is done or performed, before bringing an action on the bond, is not analogous to a statute of limitations, but it is a condition precedent which must be performed before the right to bring an action on the bond accrues. Or in other words, it is a condition or burden placed upon the beneficiaries of the bond which they must perform or remove before they can avail themselves of its benefits. It is as much so as would be the case if this provision of the general statute was set out as a proviso in the bond."

The argument for plaintiff in error is to the effect that since the right of action by a third party upon such a bond is of statutory origin, and since the statute in force at the time the bond in suit was given required a preliminary notice given to the obligors within a certain time, which notice (under *Grant* v. *Berrisford*) constituted a condition precedent to the action as much as if it had been set out as a proviso in the bond, a subsequent act of legislation dispensing with such notice, or changing the time within which it was required to be given, impairs the validity of the contract within the meaning of § 10 of Art. I of the Constitution.

The argument rests at bottom upon the proposition that because it required legislation to render such a bond actionable in behalf of third parties, the obligation of the bond as a contract is of statutory origin. But this

is not entirely clear. Treating the bond as voluntarily made, and aside from the statute, it is, in its essence, a contract between the obligors (including the Surety Company), on the one hand, and "all persons doing work or furnishing materials" for the construction of the school building (including the Decorating Company as one of those persons), on the other hand. The circumstance that the obligee in the bond as written was a public corporation named as trustee for the workmen and materialmen affects the form and not the substance of the obligation. The decision in *Breen* v. *Kelly*, denying the third party's right of action and holding such a bond void as to him, was not based upon any illegality or want of consideration in the contract, nor upon any incapacity of the obligors to make it; nor, indeed, upon any incapacity on the part of the real obligees to accept and rely upon such an undertaking. It proceeded wholly upon the ground of the legal incapacity of the municipal corporation to act as trustee for the persons beneficially interested.

But where parties have, in good faith and for a valuable consideration, entered into an engagement that is not contrary to good morals, and is invalid only because of some legal impediment, such as the incapacity of a nominal party or the omission of some merely formal requirement, there is ground for maintaining that the legislature may by subsequent enactment provide a legal remedy, and thus give vitality to the obligation that the parties intended to create. Cooley's Const. Lim., *293, *374; Sutherland on U. S. Const. 428, 429; *Ewell* v. *Daggs*, 108 U. S. 143, 151; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 488.

Nevertheless, granting, for the sake of the argument, the contention of the plaintiff in error that the contract in suit, so far as pertains to its obligation, is of statutory origin, it by no means follows that the provision respecting a preliminary notice to the obligors, as a condition

precedent to suit thereon, although contained in the law as it stood at the time the bond was given, cannot be constitutionally modified by subsequent legislation. The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges or modifies the obligation of a contract, and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself.

As Chief Justice Marshall observed in *Ogden* v. *Saunders*, 12 Wheat. 213, 349, the obligation and the remedy originate at different times. "The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a preëxisting obligation."

The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract." *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 439; citing many previous cases.

In *Bernheimer* v. *Converse*, 206 U. S. 516, this court held that a statute of Minnesota, enacted for the purpose of giving a more efficient remedy to enforce the contractual liability of stockholders to creditors, by enabling a receiver to maintain an action for the benefit of creditors outside of the jurisdiction of the court appointing him,—a remedy that by the laws of Minnesota was not available at the time the stock liability in question arose,—did not impair the obligation of the contract. Mr. Justice Day, speaking for the court, said, (at p. 530): "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made."

Again, in *Henley* v. *Myers*, 215 U. S. 373, where defendants became stockholders in a Kansas corporation at a time when by the laws of that State the stockholders of an insolvent corporation were liable to pay for the

benefit of creditors an amount equal to the par value of their stock, and the stock of the corporation was transferable only on the books of the corporation in such manner as the law prescribed; and afterwards, and before defendants sold their stock, the previous statute was amended so as to require the officers of a corporation, as soon as any transfer of stock was made upon its books, to at once file a statement thereof with the Secretary of State, and so that no transfer of stock should be legal or binding until such statement was made; and defendants, before insolvency of the corporation, transferred their stock upon the books of the corporation, but did not procure a statement of the transfer to be filed with the Secretary of State, and were therefore held liable in the state court to an action in favor of the receiver for the benefit of creditors; this court held that the act requiring stock transfers to be noted upon the public records, and providing that no transfer of stock should otherwise be legal or binding, did not impair the obligation of the contract under which the defendants acquired their stock.

In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond, affects the remedy and not the substantive agreement of the parties. And although the statute as it stood when the bond was given (R. L. 1905, § 4539) must, under *Grant* v. *Berrisford*, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute (G. L. 1909, chap. 413), effected merely a change in the remedy, without substantial modification of the obligation of the contract.

Judgment affirmed.

UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *v.* UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

CHICAGO JUNCTION RAILWAY COMPANY *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

Nos. 621, 622. Argued October 24, 1912.—Decided December 9, 1912.

In view of continuity of operation, manner of compensation for, and performance of, services in connection with interstate transportation, the Union Stock Yard & Transit Company and the Chicago Junction Railway Company are subject to the terms of the Act to Regulate Commerce and must conform to its requirements in regard to filing tariff and also desist from unlawful discriminations to shippers.

The Interstate Commerce Act, as amended by the Elkins and Hepburn Acts, extends to all terminal facilities and instrumentalities.

Service that is performed wholly in one State is still subject to the Act to Regulate Commerce if it is a part of interstate commerce.

The duties of a common carrier in the transportation of live stock begin with their delivery to be loaded and end only after unloading and delivery, or offer of delivery, to the consignee. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128.

The character of the service rendered in regard to carriage of interstate freight and not the manner in which the goods are billed determines whether the commerce is interstate or not; and so *held* that although neither the Stock Yard Company nor the Junction Railway Company issues through bills of lading, still, as the goods handled are in transit from one State to another, both corporations are engaged in interstate commerce.

Where two corporations, the controlling stock of both of which is owned by one holding company, operate jointly, one handling only the stock yard business and the other the business of transferring and switching cars containing freight in interstate transit, both are to be deemed railroads within the terms of the Act to Regulate Commerce and are subject to its requirements.

While the Act to Regulate Commerce excludes transportation wholly within a State, a corporation owning a railroad and doing other business in connection with freight in interstate carriage cannot, by leasing the railroad to another company for a share of the profits, exempt itself from the operation of the law.

A contract by an interstate carrier by railroad to pay a part of the cost of the plant of one of its shippers who agrees only to handle goods moved by it, *held* in this case to be an illegal discrimination and rebate under the Act to Regulate Commerce.

A shipper receiving a bonus from the carrier for erecting a plant on the line of the carrier has an undue advantage over a shipper not receiving any bonus or a smaller bonus.

It is the object of the Interstate Commerce Act and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit all practices running counter to the purpose of placing all shippers upon equal terms.

192 Fed. Rep. 330, affirmed in part and reversed in part.

THE facts, which involve the application of §§ 2, 6 and 20, of the Interstate Commerce Act, and of § 1 of the Elkins Act, to the Union Stock Yard & Transit Company of Chicago and the Chicago Junction Railway Company, are stated in the opinion.

Mr. Assistant Attorney General Adkins and *Mr. William E. Lamb*, Special Assistant to the Attorney General, for the United States, appellant in No. 621 and appellee in No. 622:

The Stock Yard Company and the Junction Company are common carriers engaged in the transportation of property wholly by railroad from one State to another.

Both companies are engaged in the transportation of property wholly by railroad from one State to another.

Property is in interstate commerce from its delivery to the carrier for shipment into another State until it is there delivered to the consignee. *Coe* v. *Erroll*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557; *Henderson* v. *New York*, 92 U. S. 271; *Wabash R. Co.* v. *Illinois*, 118 U. S.

557; *Rhodes* v. *Iowa*, 170 U. S. 412; *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270.

The commerce act specifically defines "railroad" and "transportation" to include all property and every instrumentality used, and every step taken in such interstate commerce. Section 1, act of June 29, 1906.

Both companies are engaged in transportation. Their activities are within both the judicial and legislative definitions.

It is immaterial if the distance be short or cars only be hauled. *M. P. Ry.* v. *Gwinn Co.*, 55 Kansas, 525.

Cars are the subject of carriage. *R. R. Co.* v. *R. R. Co.*, 109 Illinois, 135; *United States* v. *C. & N. W. Ry. Co.*, 157 Fed. Rep. 619.

A towboat may be engaged in interstate commerce. *Moran* v. *New Orleans*, 112 U. S. 69.

Such transportation is wholly by railroad and from one State to another. *Int. Com. Comm.* v. *C., N. O. & T. P. Ry. Co.*, 162 U. S. 184; *Southern Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *United States* v. *Colo. & N. W. R. Co.*, 157 Fed. Rep. 321; *Leonard* v. *Kansas City &c. Ry. Co.*, 13 I. C. C. Rep. 573; *Standard Oil Co.* v. *United States*, 179 Fed. Rep. 614; *Denver & R. G. R. Co.* v. *Int. Com. Comm.*, 195 Fed. Rep. 968.

Both the Stock Yard Company and the Junction Company are common carriers.

Definition of common carriers. *Niagara* v. *Cordes*, 21 How. 7, 22; Redfield on Carriers &c., 1; *Dwight* v. *Brewster*, 1 Pick. 50; *Wiggins Ferry Co.* v. *R. R. Co.*, 107 Illinois, 450; *Gordon* v. *Hutchinson*, 1 W. & S. 285.

Carriers of live stock are common carriers. *Myrick* v. *Mich. Cent. R. Co.*, 107 U. S. 106; 5 Enc. Law (2d ed.), 428.

Under their charters and by reason of their activities, both corporations come within these definitions.

Each was organized as a railroad company. They cannot deny their charters. *Randolph* v. *Post*, 93 U. S. 502;

Improvement Co. v. *Slack*, 100 U. S. 648; *Union Trust Co.* v. *Randall*, 20 Kansas, 515.

Under the Illinois constitution they are common carriers. Art. 11, § 12.

The Junction Company was conceded to be a common carrier.

The properties of both companies are railroads and they are engaged in transportation within definitions of Hepburn Act.

They hold themselves out to the general public to perform these services for hire. *Union Stock Yards Co.* v. *United States*, 169 Fed. Rep. 406.

The courts have held stock-yards to be common carriers engaged in interstate commerce. *United States* v. *Union Stock Yards*, 161 Fed. Rep. 919; aff'd, 169 Fed. Rep. 404; *United States* v. *Sioux City Stock Yards*, 162 Fed. Rep. 556; *Belt Ry. Co.* v. *United States*, 168 Fed. Rep. 542; *United States* v. *Illinois Terminal Ry. Co.*, 168 Fed. Rep. 546; *McNamara* v. *Wash. Terminal Co.*, 37 App. D. C. 384. See also *Covington Stock Yard Company* v. *Keith*, 139 U. S. 128; *Walker* v. *Keenan*, 73 Fed. Rep. 755.

The Stock Yard Company and Junction Company are in reality partners and are but one system in the eyes of the law. *Meehan* v. *Valentine*, 145 U. S. 623; *Southern Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Milwaukee Refrig. Transit Co.*, 142 Fed. Rep. 247; 145 Fed. Rep. 1007; and *Kendall* v. *Klapperthal*, 52 Atl. Rep. 92.

The payment under the Pfælzer contract would constitute a rebate, concession, and unlawful discrimination. Act to Regulate Commerce, §§ 2, 3; Elkins Act, § 1; *Int. Com. Comm.* v. *Reichmann*, 145 Fed. Rep. 235; *Thomas* v. *United States*, 156 Fed. Rep. 897; *United States* v. *Milwaukee Refrig. Transit Co.*, 142 Fed. Rep. 247; 145 Fed. Rep. 1007; *C. & A. Ry. Co.* v. *United States*, 156 Fed. Rep.

558; *United States* v. *D., L. & W. R. Co.*, 152 Fed. Rep. 269; *A., T. & S. F. Ry. Co.* v. *United States*, 170 Fed. Rep. 250; *Wight* v. *United States*, 167 U. S. 512; and *N. Y., N. H. & H. R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 398; *Armour Packing Co.* v. *United States*, 209 U. S. 71.

Such payment would, therefore, be unlawful on the part of the Stock Yard Company and the Investment Company, and the receipt thereof would be unlawful on the part of the Pfælzers. See cases cited *supra.*

The Commerce Court had jurisdiction of the bill. Sections 2 and 3, Elkins Law; §§ 2, 3 and 6, Act to Regulate Commerce.

The decree in appeal 621 must be reversed and that in appeal 622 affirmed.

Mr. Ralph M. Shaw for appellees in No. 621 and appellant in No. 622:

The Act to Regulate Commerce does not apply to all carriers or to all commerce.

For the purposes of this case, before a corporation is subject to the provisions of the act it must simultaneously be not only a common carrier, but one wholly by railroad, and also one engaged in the transportation of passengers or property from one State or Territory to another.

A common carrier by railroad wholly within one State can so transact its business as not to subject itself to the provisions of the Act to Regulate Commerce. *Cincinnati &c. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 184, 191.

"The Junction Co." is not a common carrier subject to the provisions of the Act to Regulate Commerce, because it is not engaged in the transportation of passengers or property from one State to another. It lies wholly within one State; it does not issue bills of lading; it does not deal either with the consignor or the consignee with respect to either inbound or outbound freight; it does not receive as compensation for its services any proportion of a

through rate, otherwise known as a "conventional division of rates."

When it hauls with its own motive power any freight on its own tracks it receives a flat switching charge therefor irrespective of the origin or destination or character of the freight.

When foreign carriers use its rails, they pay to it a fixed trackage sum per car irrespective of the origin, destination or character of the freight or of the revenue derived therefrom. *Int. Com. Comm.* v. *C., K. & S. R. Co.*, 81 Fed. Rep. 783; *Int. Com. Comm.* v. *B. Z. & C. Ry. Co.*, 77 Fed. Rep. 942; *Gracie* v. *Palmer*, 8 Wheat. 605.

The relation of the Junction Company to freight cars loaded with interstate commerce, which it hauls with its own motive power from receiving tracks in Illinois to unloading platforms in Illinois, is analogous to and identical with the relationship of a tugboat to an incoming steamer.

A tugboat is not a common carrier. *The Steamer Webb*, 14 Wall. 406, 414; *The Margaret*, 94 U. S. 494; *The L. P. Dayton*, 120 U. S. 337; *The Propellor Burlington*, 137 U. S. 386; *The J. P. Donaldson*, 167 U. S. 599, 603.

The "Stock Yard Co." is not subject to the provisions of § 1 of the Act to Regulate Commerce because it is not a common carrier; nor engaged in the transportation of property or passengers from any point in one State to any point either in or without a State. *Kentucky & Ind. Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Cattle Raisers' Assn.* v. *Ft. W. & D. C. R. Co.*, 7 I. C. C. Rep. 513, 536.

When an act of Congress has been construed by the courts and thereafter the act is amended or reënacted, and the amendments do not affect in any way whatsoever the provisions so construed, thereafter the courts will assume that Congress has approved and adopted the judicial interpretation placed upon its language; also when a statute has been officially interpreted by the body charged

with its execution, and thereafter the act is amended, and the amendments of Congress do not in any respect change the particulars so interpreted, the courts will assume that Congress has approved and adopted such interpretation irrespective of what the courts might have originally determined to be the correct interpretation. *United States* v. *Mooney*, 116 U. S. 104, 106; *Kepner* v. *United States*, 195 U. S. 100, 124; *The Abbottsford*, 98 U. S. 444; *Diaz* v. *United States*, 223 U. S. 442, 454; *Standard Oil* v. *United States*, 221 U. S. 1, 59; *N. Y., N. H. & H. R. R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, 401; *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Hermanos*, 209 U. S. 337.

The "Investment Company" is not subject to the provisions of § 1 of the Act to Regulate Commerce, because it is not a common carrier, nor engaged in the transportation of property or passengers from any point in one State to any point, either within or without the State.

Irrespective of what the decision of the court may be either as to the "Stock Yard Company," or as to "The Junction Company," the mere fact that "The Investment Company" owns shares of stock of the two companies does not destroy its identity or merge it into the identity of either of the other two companies. *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *Coal Belt Electric Ry. Co.* v. *Peabody Coal Co.*, 230 Illinois, 164.

The United States Commerce Court not only had jurisdiction to determine whether the assailed contract was or was not unlawful, but it was its duty to determine such question. Elkins Act, §§ 2, 3.

When the jurisdiction of a court of equity is invoked in good faith, the court will decide all of the questions presented by the case, even though it decides the jurisdictional question against the person invoking the jurisdiction. *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175; *Michigan*

R. R. Tax Cases, 138 Fed. Rep. 223; *Burton* v. *United States*, 196 U. S. 283; *Williamson* v. *United States*, 207 U. S. 425; *Hopkins* v. *Grimshaw*, 165 U. S. 342; *Ober* v. *Gallagher*, 93 U. S. 199; *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1; 2 Current Law, 623.

The Pfælzer contract is not illegal. It is made for the purpose of maintaining a desirable customer at the live stock market at the Stock Yards.

It is not made by a common carrier or on behalf of a common carrier with a shipper, nor is it based upon the transportation of any property whatsoever.

It has nothing to do with the rates charged or paid for the transportation of any property. *Willoughby* v. *Chicago Junction Railways Co.*, 50 N. J. Eq. 656.

The Interstate Commerce Act should be interpreted *in pari materia* with the Anti-trust Act. It should be held that a contract, not made by a common carrier subject to the Act to Regulate Commerce, is not prohibited by law if its main purpose and chief effect is to promote the lawful business of the parties making it. *Hopkins* v. *United States*, 171 U. S. 578; *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. Rep. 704, 712; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *American Tobacco Co.* v. *United States*, 221 U. S. 106.

Mr. Willard M. McEwen and *Mr. Joseph Weissenbach*, filed a brief for appellees, Louis Pfælzer & Sons:

The making of donations to assist enterprises to aid the business of a corporation is a legitimate object of contract and is not against public policy. *Ellerman* v. *Chicago Junction Rys. Co.*, 49 N. J. Eq. 217; *Willoughby* v. *Chicago Junction Rys. &c. Co.*, 50 N. J. Eq. 656; *Richelieu Hotel Co.* v. *Milw. Encampment Co.*, 140 Illinois, 248, 263–264; *B. S. Green Co.* v. *Blodgett*, 159 Illinois, 169, 174; *Central Lumber Co.* v. *Kelter*, 201 Illinois, 503; *Northern Pac. R. Co.* v. *Spokane*, 56 Fed. Rep. 915; *S. C.*, 64 Fed.

Rep. 506, and cases cited; *McGeorge* v. *Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Vandall* v. *S. S. F. Dock Co.*, 40 California, 83; *People* v. *Eel River &c. R. R. Co.*, 98 California, 665; *Temple St. Ry.* v. *Hellman*, 103 California, 634; *Texas & St. L. R. R. Co.* v. *Robards*, 60 Texas, 545; *Whetstone* v. *Ottawa University*, 13 Kansas, 320; *Town Co.* v. *Russell*, 46 Kansas, 382; *Hasson* v. *Venango Bridge Co.*, 1 Pa. Dist. Rep. 521; *Leslie* v. *Lorillard*, 110 N. Y. 519; *Louisville & Nashville R. R. Co.* v. *Literary Society*, 91 Kentucky, 395.

Discrimination backed by a sound reason (as distinguished from motive) in a matter where an individual has no right to demand the privilege as a public service undertaken to be furnished by a carrier as such to all alike and which deprives him of nothing which he is entitled to, or subjects him to no disadvantage in the public service rendered to him, is not forbidden by the law. *Memphis Frt. Bureau* v. *Ft. Smith Ry. Co.*, 13 I. C. C. Rep. 1; *Int. Com. Comm.* v. *L. & N. R. Co.*, 73 Fed. Rep. 409; *Central Yellow Pine Assn.* v. *V. S. & P. Ry. Co.*, 10 I. C. C. Rep. 193; *United States* v. *Wells-Fargo*, 161 Fed. Rep. 606; *Int. Com. Comm.* v. *Alabama Ry. Co.*, 74 Fed. Rep. 715; *Cole* v. *Rowen*, 13 L. R. A. 848; *Donovan* v. *Pa. Ry. Co.*, 199 U. S. 278; *Gamble* v. *C. & N. W.*, 168 Fed. Rep. 164; *United States* v. *Oregon R. & Nav. Co.*, 159 Fed. Rep. 982; *Central Stock Yds. Co.* v. *L. & N. R. Co.*, 24 I. C. C. Rep. 339; 118 Fed. Rep. 113; 55 C. C. A. 63; 192 U. S. 568; *Hart* v. *Choctaw, Ok. & G. Ry.*, 118 Fed. Rep. 169; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 404; *N. P. Ry.* v. *Railroad Comm.*, 28 L. R. A. (N. S.) 1021; *Int. Com. Comm.* v. *Alabama Midland R. Co.*, 168 U. S. 144; *L. & N. R. Co.* v. *Behlmer*, 175 U. S. 684.

What a donation is depends both upon its effect as to all concerned and the intention of the parties as to application. These are the elements of the discrimination and are questions of fact to be proved by the peti-

tioner. *Int. Com. Comm.* v. *L. & N. R. Co.*, 73 Fed. Rep. 409; *Int. Com. Comm.* v. *Alabama Midland R. Co.*, 168 U. S. 144, 170; *Root* v. *L. I. R. Co.*, 114 N. Y. 300; 4 L. R. A. 33; *Texas* v. *Int. Com. Comm.*, 162 U. S. 197; *Int. Com. Comm.* v. *Baltimore R. Co.*, 43 Fed. Rep. 37; *S. C.*, 145 U. S. 263.

The presumption is in favor of fairness and legality. *Int. Com. Comm.* v. *C. G. W. R. Co.*, 209 U. S. 108.

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from a decree entered by the Commerce Court in an action begun by the United States on the application of the Attorney General at the request of the Interstate Commerce Commission against the Union Stock Yard and Transit Company of Chicago an Illinois corporation (hereinafter called the "Stock Yard Company"), the Chicago Junction Railway Company, an Illinois corporation (hereinafter called the "Junction Company"), and the Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation (hereinafter called the "Investment Company"), and David Pfælzer, Abe Pfælzer and Jones L. Pfælzer, a copartnership doing business under the firm name and style of Louis Pfælzer & Sons. The bill sought to enjoin violations of §§ 2, 6 and 20 of the Interstate Commerce Act, as amended 24 Stat. 379, c. 104; 34 Stat. 584; 36 Stat. 539, c. 309 and of § 1 of the Elkins Law as amended 34 Stat. 584, c. 3591. Its prayer was that an injunction should issue to restrain the Stock Yard Company and the Junction Company from further engaging in interstate commerce until they had filed tariffs as required by § 6 of the act and to restrain the performance of a certain contract with the Pfælzers, and that the Stock Yard Company and the Junction Company be required to file the statements and reports provided by § 20 of the act.

The Commerce Court held that neither the Stock Yard Company nor the Investment Company was a common carrier, and that it had no jurisdiction to determine whether the contract would amount to an unlawful discrimination or advantage, or rebate, and dismissed the bill as to the Stock Yard Company and the Investment Company and as to the Pfælzers. As to the Junction Company, it held that it was a common carrier subject to the Interstate Commerce Act and obliged to file its tariffs as required by the statute. It further held that, since there was no allegation in the bill that the Interstate Commerce Commission had by general or special order required the Stock Yard Company or the Junction Company to file statements and reports under § 20, it could not issue mandamus to make such statements and reports. 192 Fed. Rep. 330.

The Government appealed from the dismissal of the bill as to the Stock Yard Company, the Investment Company and the Pfælzers, which is case No. 621. It, however, makes no contention against the holding of the Commerce Court as to the construction of § 20. The Junction Company appealed from the decision of the Commerce Court as to it, which appeal is case No. 622.

The correctness of the decision and decree of the Commerce Court is submitted upon facts which are practically undisputed. The Stock Yard Company was incorporated under a special act of the legislature of Illinois, February 13, 1865; Laws 1865, v. 2, p. 678, which authorized it to locate, construct and maintain near the southerly limits of the City of Chicago:

" . . . All the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turn-outs, aqueducts, for the reception, safe-keeping, feeding, and watering, and for the weighing, delivery, and transfer of cattle and live stock of every description, and also dead and undressed animals that may be at or pass-

ing through or near the city of Chicago, and for the accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same; . . . to make advances of money upon such cattle and live stock, for freight or other purposes, as may become expedient. . . ."

The charter further provided:

"That said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, . . . and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; . . . and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, . . . freight and property of every kind as well as stock and cattle. . . ."

After its creation it acquired real estate, constructed and operated stock yards, with a stock market, built a hotel for the accommodation of its patrons, and constructed in the stock yards district about 300 miles of railroad track consisting of main lines connecting with the

trunk lines entering Chicago and a large number of switches to the various industries which had been established adjacent to such tracks.

Prior to December 15, 1897, the Stock Yard Company carried on the stock yards and railroad business, and, although it had regular charges for the services it performed, it filed no tariffs with the Interstate Commerce Commission and concurred in none. On December 15, 1897, the Stock Yard Company leased all of its railroad tracks and equipment for a term of fifty years to a corporation known as the Chicago and Indiana State Line Company (hereinafter called the "State Line Company"), retaining for itself the loading and unloading platforms and facilities used in connection with its stock yards business. This lease covered all its railroad and railroad tracks, switches, etc.; roundhouse, repair shops, machine shops, coal chutes, etc., then in existence or theretofore used by the Stock Yard Company in connection with its railroad; and all and singular the equipment and the telegraph lines, instruments and appurtenances owned or possessed by the Stock Yard Company and used by it in conducting its railroad business. By the terms of the lease the State Line Company was given the right in the future to maintain and operate upon the lands of the Stock Yard Company additional side tracks and switch tracks and other appurtenances necessary to reach industrial plants.

Afterwards the State Line Company consolidated with the Chicago, Hammond & Western Railroad Company, and the consolidated company became known as the Chicago Junction Railway Company (defendant herein) and, in addition to the railroad leased from the Stock Yard Company, operated a belt line around the City of Chicago. In November, 1907, the Junction Company sold the belt line to the East Chicago Belt Railroad Company, retaining the tracks which had been leased by the Stock Yard Company. The equipment operated by the Junction

Company, consisting of locomotives and rolling stock, is owned by the Stock Yard Company, but the Junction Company employs its own engineers and crews.

The tracks of the Junction Company are frequently used by the trunk lines to connect the eastern and western systems and to deliver shipments originating without the State to the platforms of the Stock Yard Company, for which service they pay the Junction Company a trackage charge of a fixed sum per car. Large numbers of carload lots of dead freight from points without the State are placed on the receiving tracks of the Junction Company bearing transfer cards showing the destination of the cars, and the Junction Company delivers the cars either to the consignee, if situated on its tracks, or to the receiving track of the forwarding carrier. It is paid by the trunk lines a fixed charge for this service, which the latter absorb. The Junction Company upon the order of the trunk lines places cars for loading by shippers in the stock yards district and after they are loaded hauls them to the receiving tracks of the trunk lines, and it receives from the trunk lines a fixed amount for this service, which is absorbed by the latter. Less than carload lot freight is delivered at the freight depot known as the Union Freight Station and placed in cars by the Junction Company which transports them to the receiving tracks of trunk lines, and for this service the trunk lines pay the Junction Company five cents per hundred weight. Sometimes such freight is hauled from the industries in the stock yards district to the Union Freight Station by the Junction Company and distributed in the cars. The Junction Company receipts for the less than carload lot freight in the name of the trunk lines, such receipts being exchangeable for bills of lading at the office of the trunk lines, and all charges paid to the Junction Company are receipted for in the name of the trunk lines and remitted to them. The Junction Company has an arrangement with the Balti-

more & Ohio Railroad Company whereby it performs a like service for such company as to the less than carload lot freight brought by it to the Union Freight Station and destined to points beyond the State. Shipments of horses are transported by the trunk lines to the loading platforms of the Stock Yard Company and there picked up by the Junction Company and hauled to the unloading chutes for horses, and the Junction Company receives, besides the trackage charge, a certain amount per car for this service. A large part of the service thus performed by the Junction Company is in connection with interstate shipments. The Junction Company does not issue any bills of lading with respect to any kind of freight.

After leasing its railroad property to the Junction Company, the Stock Yard Company continued to operate its stock yard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the State, and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed and water live stock shipped to consignees doing business in the stock yards district.

The employés of trunk lines bringing live stock to the stock yards turn over the waybills accompanying such shipments, with what are called "live stock stubs" attached, to the employés of the Stock Yard Company, who use the waybills in unloading and counting the stock, and the waybills and stubs are then sent to the auditor of the Stock Yard Company (being also the auditor of the Junction Company) who retains the stubs and forwards the waybills to the local agents of the trunk lines. The Stock Yard Company advances the charges on such shipments to the trunk lines and collects from the consignees, usually commission men doing business at the stock yards, the moneys it has so advanced for their accommodation.

The Junction Company publishes tariffs showing the charges which it exacts for its services, such tariffs being

in general circulation in Chicago, especially about the stock yards district, but they were not filed with the Interstate Commerce Commission. Prior to 1907, the Junction Company, while owning railroad facilities in Indiana, had filed tariffs with the Interstate Commerce Commission, but upon the sale of such properties cancelled the tariffs. It was the belief of the Government and of the Junction Company that all tariffs and concurrences had been cancelled, but it is shown by a stipulation which the parties have filed that since the issues were made up it has been discovered that one particular concurrence through inadvertence was not cancelled.

The Investment Company is a holding company and owns over ninety per cent. of the shares of the Stock Yard Company and practically all of the shares of the Junction Company.

As to the contract with the Pfælzers: They were members of a copartnership (since incorporated) engaged in the slaughtering business, their plant being located in the vicinity of the tracks operated by the Junction Company and the cattle pens of the Stock Yard Company. They purchased cattle from time to time outside the City of Chicago and in States other than Illinois and shipped them to the partnership at the stock yards, where they were handled as hereinbefore stated for delivery to the consignee. The freight charges on such business averaged for the five years prior to the filing of the Pfælzers' answer about $2,800 annually. The amount of freight consigned to the Pfælzers tends to increase the business of the Stock Yard Company and the Junction Company and therefore the revenue of each.

In 1906 the Department of Agriculture required the Pfælzers to make changes in their plant; in 1908 it directed them to erect a new plant, and in 1909 they were notified that the Government would deny to them further inspection of the products of their plant. They then proposed

to locate in Kansas City, Missouri, but upon negotiation with the Stock Yard Company made the contract under consideration here. This contract provided that upon the erection by the Pfælzers of a modern slaughtering, packing and canning plant adjacent to the stock yards in Chicago, costing a certain sum and having a required capacity, the Stock Yard Company would pay them $50,000, and the Pfælzers agreed that all live stock slaughtered or canned by them within a radius of 200 miles would either be purchased at such stock yards or pass through and use them, the customary yardage, tolls and charges to be paid thereon, or that the Pfælzers would pay full tolls and charges on live stock the same as if it had been sent to the stock yards for sale and had there been bought by them; and that for fifteen years they would conduct all their slaughtering, packing and canning business at such plant and not interest themselves directly or indirectly in any other plant or in any other stock yards. The Investment Company guaranteed the performance of the contract by the Stock Yard Company.

It is stated in the answer of the Stock Yard Company and stands admitted in the case that there are other competitive stock yards in the United States which have built up their business in competition with it by offering and giving inducements, either in the shape of land or money, to packing houses and other industries to locate at or near their yards.

From this statement it is apparent that the Stock Yard Company was organized for the purpose of maintaining a stock yard, with the usual facilities of such yards as to loading and unloading and caring for freight, and it was authorized to and did own and operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the State and to points outside of the State. This service, so far as the railroad

and its operation is concerned, is now performed by the Junction Company. The Stock Yard Company still continues to perform the customary stock yard operations, but by means of the lease to the Junction Company it has divested itself of the operation of the railroad system which it was authorized by its charter to construct and operate and which for many years before the lease it did in fact operate. The Stock Yard Company, under the lease, still gets, however, two-thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation. This joint service now takes the place of the single service formerly rendered by the Stock Yard Company. The stock of both these companies is held in common ownership by the Investment Company, and it appears that the Investment Company guarantees the contracts, or at least some of them, of the Stock Yard Company.

In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the Act to Regulate Commerce and bound to conform to its requirements?

The Interstate Commerce Act, as amended by the Hepburn Act, 34 Stat. 584, c. 3591, § 1, applies to common carriers engaged in the transportation of persons or property from State to State wholly by railroad, and the term railroad is defined to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property"; and transportation is defined to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage,

irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. "The transportation of live stock," said this court in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, "begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee." In this connection see *Coe* v. *Errol*, 116 U. S. 517; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, *supra*, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, *supra*; *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101.

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under

a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In *Union Stock Yards Co.* v. *United States*, 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):

"Its [the Stock Yards Company's] operations . . . include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stock-yards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the Interstate Commerce Acts.

As to the Pfælzer contract, both parties concede the authority of the Commerce Court to pass upon this subject and no objection was made as to the manner and form in which the jurisdiction of that court was invoked. There being no objection taken to the method of proceeding, we think, if this contract is within the prohibitions of the act, that the Commerce Court had the right to entertain the bill and to enjoin the performance of the contract. Sections 2 and 3 of the Elkins Act. It is contended that this contract is violative of certain features of the Act to Regulate Commerce and of the Elkins Act. Section 2 of the former and § 1 of the latter provide:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge,

demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"SEC. 1 . . . It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. . . ."

This court has had frequent occasion to comment upon the purpose of Congress in the passage of these laws to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155.

By § 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the

transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced. By the very terms of the contract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfælzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive $50,000, and it obligates them to maintain and operate the plant for a period of fifteen years and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so bought to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of $50,000, with the bonus given to the Pfælzers for the location of their plant in juxtaposition to the stock yards. The only interest which the Stock Yard Company has in Pfælzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has

been an undue advantage given to and an unlawful discrimination practiced in favor of Pfælzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates—and we must consider the case in that light—and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.

It follows that in case No. 621 the judgment of the Commerce Court should be reversed and the case remanded for the entry of a decree in conformity to this opinion. In No. 622 the judgment of the Commerce Court should be affirmed.

STATE OF FLORIDA ON THE RELATION OF WAILES *v.* CROOM, COMPTROLLER OF THE STATE OF FLORIDA.

ERROR TO THE SUPREME COURT OF FLORIDA.

No. 646. Submitted December 2, 1912.—Decided December 16, 1912.

Where it appears, although by evidence outside the record, that before the writ of error to the state court was sued out, the public officer against whom a writ of mandamus is prayed had died, and his successor had qualified, the writ will be dismissed.

THE facts are stated in the opinion.

Mr. W. S. Jennings, *Mr. E. J. L'Engle* and *Mr. Park Trammell* for defendant in error, in support of motion to dismiss.

No appearance for plaintiff in error.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

This is an action in mandamus. The party proceeded against in the state court was A. C. Croom, sued in his official character as comptroller of the State of Florida. On January 16, 1912, the Supreme Court of Florida affirmed a judgment denying the writ. On April 11, 1912, this writ of error was sued out by the relator below, and Croom, comptroller, was named as defendant in error. Citation was served by delivering a copy to the Attorney General of the State of Florida. The attorneys who represented the defendant in the state courts, acting as friends of the court, have placed upon the files evidence establishing that A. C. Croom died on February 7, 1912, and that William V. Knott was thereafter appointed and duly qualified as comptroller of the State of Florida, and has been acting as such since February 17, 1912. Under the circumstances thus detailed it results that the writ of error was improvidently sued out, and it must therefore be dismissed.

Writ of error dismissed.

ROBERTSON *v.* GORDON, AND BUTLER AND VALE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 56. Argued November 15, 1912.—Decided December 16, 1912.

A contract between attorneys for division of fees construed according to the definite meaning therein expressed.

Quære whether evidence to prove that there was a condition precedent to be performed before a contract took effect is admissible without a cross-bill.

Under a contract by attorneys for division of fees, if the attorney claiming did any work, whether more or less, there is no failure of consideration.

Where an agreement to leave a dispute as to amounts due under a contract to certain third parties provides that in case of their refusal to act no rights are affected, it is not permissible after such a refusal to bring in an attempt of another tribunal to adjudicate the claim.

The decision of a court that has no jurisdiction of the subject-matter or the parties is not *res judicata*.

An act of Congress directing the Court of Claims to determine the amount due attorneys for fees in an Indian litigation to be apportioned by certain attorneys named amongst all entitled to share as agreed among themselves, concerns only the amount and not the manner of distribution, *United States* v. *Dalcour*, 203 U. S. 408, and so *held* as to the act of June 21, 1906, c. 3504, 34 Stat. 325.

In this case a contract between two attorneys agreeing to share equally all fees received from an Indian litigation, held not to have been superseded by a decision that one was entitled to a much larger share than the other made by the Court of Claims under authority of an act of Congress authorizing it to determine the total amount due to all attorneys.

34 App. D. C. 539, reversed.

THE facts, which involve the construction of a contract between attorneys for division of fees, are stated in the opinion.

Mr. George H. Lamar, with whom *Mr. George H. Patrick* was on the brief, for appellant.

Mr. Henry E. Davis for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon the following contract:

March 28, 1906.

This agreement made between F. C. Robertson and Hugh H. Gordon, witnesseth, that they shall share equally in all monies, appropriated by Congress, or allowed by the Interior Department which may accrue to said Gordon or said Robertson as attorney fees, growing out of the rendition of services to the Colville tribe of Indians, whether, allowed under the Maish-Gordon contract with said tribes, or on any other theory whatsoever, which said interest is to inure to either party, no matter in whose name such allowance is made. Both parties hereto to mutually labor to secure such allowance. Out of said Robertson's share he agrees to compensate R. D. Gwydir, by a reasonable compensation. The fees to be divided between said Robertson & said Gordon as herein provided shall be the net sum accruing to said Gordon, after settling with other attorneys under contracts heretofore made by said Gordon.

F. C. ROBERTSON.
HUGH H. GORDON.

There is also a claim upon a receipt signed by Gordon for $150 given by Robertson to Gordon "with which to pay expenses of trip to Washington, D. C., to look after the interests of Gordon Gwydir & Robertson in the matter of the claim of the Indians, of the Colville Reservation against the U. S. Government. In case we succeed in collecting said claim, I agree that out of my share of the

profits, I will repay to said Robertson the said one hundred and fifty dollars." This was dated March 21, 1906, a few days earlier than the one first set forth.

By an act of June 21, 1906, c. 3504, 34 Stat. 325, 377, 378, a million and a half dollars were set aside by Congress for payment to the Indians in respect of the matter as to which the contract contemplated that services would be rendered to them. This statute also gave jurisdiction to the Court of Claims to render a judgment in favor of Butler and Vale, attorneys, for all services by all lawyers to the Indians; the amount to be paid out of the fund and to be apportioned among such lawyers by agreement among themselves. One fifth of the fund was paid over to the Indians under an act of March 1, 1907 (34 Stat. 1015, c. 2285). By an act of April 30, 1908, c. 153, 35 Stat. 70, 96, another fifth was directed to be paid over in pursuance of the statute of 1906. Meantime Butler and Vale had brought their suit in the Court of Claims and on May 25, 1908, the court gave judgment for a total of $60,000, of which it undertook to apportion $14,000 to Gordon and $2,000 to the plaintiff and appellant. 43 Ct. Cl. 497, 525. Thereafter in August, 1908, this bill was filed to secure payment out of the Indian fund and to establish the plaintiff's right to an equal share in the amount allotted to Gordon and a lien upon that amount for such share and for the $150 additional advanced as above set forth.

The controversy is wholly between Robertson and Gordon and it is unnecessary to refer to the other parties or other aspects of the case. The Maish-Gordon contract with the Indians had expired at the time of the agreement in suit and one of the defences is that the agreement was made upon the implied understanding and condition that Robertson should get a new contract with the Indians, which never came to pass. The other defences are that the matter is concluded by the judgment of the Court of

Claims, and that the agreement was superseded by two other agreements of a little later date, made when the matter of an appropriation for the Indians was pending in Congress. The first of these, dated April 3, 1906, and signed by Gordon, Robertson, Butler and Vale, was that the parties would submit to the Conference Committee of the Senate and House their respective claims for services, on a *quantum meruit*, and would abide by any award that should be made, "and in case no award shall be made the rights of the said parties shall remain unaffected." The second agreement dated April 12, 1906, between Marion Butler and R. W. Nuzum, each on behalf of himself and others not named, and Gordon and Robertson, was, that, provided the sum of $150,000 was allowed for payment of attorneys representing the Indians, $18,750 should be paid to Nuzum, $9,375 to Gordon, and $9,375 to Robertson; the remainder to be distributed by Butler as he elected. "Should the appropriation be less, then this agreement is to be the basis of distribution, sharing pro rata in such diminished sum, as the percentage is thereby diminished." Both of the last two defences seem to have been sustained by the Court of Appeals. 34 App. D. C. 539. See for details not material here *Butler* v. *Indian Protective Association*, 34 App. D. C. 284; *Gordon* v. *Gwydir*, 34 App. D. C. 508.

We are of opinion that the decree must be reversed and that the plaintiff is entitled to prevail. He starts with a contract of definite meaning. We perceive no ground for the doubt suggested in the court of first instance whether this agreement applies to a sum allowed by the Court of Claims. That court merely rendered certain the amount appropriated in terms by Congress out of the Indian fund. The argument that there was a condition precedent that a new contract should be made with the Indians, although no doubt such a contract was hoped and worked for, is irreconcilable with the instrument as it stands and ap-

pears to us not to be supported by the evidence, if that evidence were admissible without even a cross bill. *Sprigg* v. *Bank of Mount Pleasant*, 14 Peters, 201, 206. *Brown* v. *Slee*, 103 U. S. 828. *Simpson* v. *United States*, 172 U. S. 372. Again there is no doubt that Robertson did some work, whether more or less does not matter, so that there was no failure of consideration, according to the common rather inaccurate phrase. The only questions then are those concerning the effect of the later contracts and the decree of the Court of Claims.

The contract of April 3, proposing to submit all claims to the Conference Committee of the Senate and the House came to nothing, because the parties were informed that the Committee would not undertake to settle disputes between lawyers. By the express terms of this instrument therefore no rights were affected. It appears to us wholly unpermissible to bring in the subsequent attempt of the Court of Claims to adjudicate on a *quantum meruit* under an act of Congress that had not then been passed, as satisfying the conditions of the contract and binding the parties by virtue of the agreement if not by its own proper force.

The second contract was not made until nine days later—not improbably on the footing that the attempt of April 3 had failed. This contemplated a fixing of the attorneys' fees by Congress, again a different course from that taken by events. We see no reason for supposing that it was intended to change the relations between Robertson and Gordon. Primarily they were on one side of the agreement against Butler and associates on the other. Secondarily they were recognized as entitled to equal shares. Neither do we see reason for connecting this with the contract of April 3, as alternatively intended to cover the whole ground and to supersede that of March 28 in suit. These later contracts were on their face successive; the earlier one applied only to an event that has

not happened and the latter if applicable in any degree does not help the defendants' case. It is not to be supposed that it tacitly overrode the agreements of the parties in March to pay certain other lawyers out of their respective shares—and if not, the March contract remained on foot.

Finally as to the defence of *res judicata* the short answer is that the Court of Claims had no jurisdiction of either the subject-matter or the parties. Of course jurisdiction could not be claimed unless the special act of June 21, 1906, heretofore mentioned, conferred it. That act authorized the court to "render final judgment in the name of Butler and Vale . . . for the amount of compensation which shall be paid to the attorneys who have performed services as counsel on behalf of said Indians in the prosecution of the claim of said Indians for payment for said land, and in determining the amount of compensation for such services the court may consider all contracts or agreements heretofore entered into by said Indians with attorneys who have represented them in the prosecution of said claim, and also all services rendered by said attorneys for said Indians in the matter of said claim." It then directed that Butler and Vale should file a petition and that the Secretary of the Treasury should pay them the sum awarded on final judgment out of the sum appropriated for the Indians—payment to be in full compensation of all attorneys who had rendered services to the Indians in the matter, "the same to be apportioned among said attorneys by said Butler and Vale as agreed among themselves" provided that before any attorney having an agreement with Butler and Vale should be paid he should deliver to the Secretary of the Interior a discharge of all demands for services in the matter of this Indian claim.

Argument hardly can make the intent of the statute clearer. The question before the Court of Claims was the

amount and the whole amount to be deducted from an Indian appropriation before it should be paid over for the Indians by the United States. That necessarily concerned the United States. The manner in which the fund should be distributed did not concern it at all. Therefore it selected representatives of all claimants against the fund, ordered the sum deducted to be paid to them and transferred all claims outstanding against the Indians to the sum so paid over—a method familiar to our legislation. *United States* v. *Dalcour*, 203 U. S. 408, 422. The reference to contracts with the Indians merely permitted the court to take them into consideration in determining what was a fair total, without being governed by them, as for instance, the expired Maish-Gordon contract which allowed ten per cent; and to the same end other services were to be taken into account. But the act itself determined what parties were to be before the court, namely Butler and Vale, they being the only ones necessary for the object in view. The plaintiff could not have made himself a party if he had wanted to, and he did not want to and did not—he rightly understood that his claim was to be satisfied outside of the suit before the court. We do not think a discussion of the evidence necessary, although we think that the courts below mistook its effect. It is enough to say that the decree of the Court of Claims perhaps was not intended to have effect and certainly could not have effect in deciding the rights of the parties among themselves.

Decree reversed.

MR. JUSTICE PITNEY was not present at the argument and took no part in the decision of this case.

MURRAY, DOING BUSINESS AS THE POCATELLO WATER COMPANY, *v.* CITY OF POCATELLO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 575. Argued December 3, 4, 1912.—Decided December 16, 1912.

This court is not prepared on the facts in this case to overrule the highest court of a State in construing the relative powers of the legislature and municipalities in establishing rates for water.

The Supreme Court of Idaho having held that under the Constitution of the State the legislature has a continuing and irrevocable power to establish the manner of fixing water rates, and that a municipality can only grant franchises subject to that power, this court follows that construction: and therefore *held* that:

A statute of the State of Idaho establishing a method for fixing water rates is not unconstitutional under the Federal Constitution as impairing the obligation of the contract with a water company under an ordinance of a municipality previously enacted and which established a different method of fixing such rates.

A court which is not empowered to grant relief whatever the merits may be, cannot decide what the merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res judicata* on the merits.

Where the judgment cannot be *res judicata* on the merits because the court has no power to grant relief, it is not made *res judicata* by reference to the opinion in which the court expresses its views on the merits.

21 Idaho, 180, affirmed.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of a statute of Idaho, are stated in the opinion.

Mr. William V. Hodges, with whom *Mr. Gerald C. Hughes*, *Mr. Clayton C. Dorsey*, *Mr. A. A. Hoehling, Jr.*, and *Mr. N. M. Ruick* were on the brief, for plaintiff in error:

The obligation of the contract evidenced by Ordinance 86 has been impaired in violation of Article I, § 10, of the Federal Constitution, and plaintiff in error has been deprived of its property without due process of law, contrary to the provisions of the Fourteenth Amendment.

The Supreme Court of the State of Idaho did not give full faith and credit to the final judgment of the Circuit Court of the United States for the District of Idaho, rendered in *City of Pocatello* v. *Murray*, 173 Fed. Rep. 382, in violation of Article IV, section 1, of the Constitution, and thereby denied the title, right, privilege and immunity claimed by this plaintiff in error under the laws and authority of the United States.

Plaintiff in error's contention is not frivolous. The fact that the United States District Court, and the Supreme Court of Idaho, have officially expressed diametrically opposite views upon this question acquits the plaintiff in error of the charge of bringing to this court a frivolous and unfounded constitutional question, predicated on that state of facts and law.

No cases in this court have disposed of questions involving the impairment of the obligations of covenants, such as are contained in §§ 3, 4 and 5 of Ordinance No. 86, by legislative acts such as § 2839 of Idaho Revised Code, under like or similar constitutional provisions.

Such a condition of affairs is the strongest inducement for this court to exercise its jurisdiction to authoritatively conclude the question. *Forsyth* v. *Hammond*, 166 U. S. 514.

Defendant in error and the Supreme Court of Idaho conceded that the city had the power, both inherent and statutory, to enter into the contract, subject only to the power of the legislature to prescribe the manner in which maximum rates may be established.

The fixing of a rate or charge for public-service corporations is a legislative act. But no legislative officer, or

body, has the jurisdiction to conclusively determine the value of the plant.

There is no limit upon the rate that may be fixed, short of a confiscatory rate. If a company whose rates have been fixed, believes such rates to be confiscatory, such company may appeal to a court of equity for protection. Then, for the first time, are the parties before a tribunal which has power to conclusively determine the value of the plant, and the reasonableness of the rates fixed.

Private individuals may, by covenant, provide means for fixing the values of the subject-matter of their contracts; provide what shall be considered a reasonable, and what an unreasonable, return on an investment made thereunder; and such covenants are incidents of ordinary business transactions. The parties thereto are by such covenants estopped from contending that the facts therein established by covenant are to the contrary thereof, or that the method of establishing such facts should not be observed, unless there is an element of fraud or other element invalidating such covenants. When a city enters into such covenants as are contained in Ordinance 86, it likewise is exercising its business and proprietary powers as distinguished from its legislative powers. *Pike's Peak Power Co.* v. *Colorado Springs*, 105 Fed. Rep. 1.

When a body authorized by law to hold a legislative inquiry for the purpose of determining the rate charges for public service takes jurisdiction to make such determination, it is a tribunal, and the parties to the rates are parties to the controversy before it for determination. *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 401; *Cedar Rapids G. L. Co.* v. *Cedar Rapids*, 144 Iowa, 426; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 47; *Prout* v. *Starr*, 188 U. S. 537.

The parties to any judicial proceeding may estop themselves as to the facts by a solemn agreement, stipulation or statement of facts. See *Blankinship* v. *Oklahoma*

Water Co., 43 Pac. Rep. 1088; 11 Columbia Law Review (No. 6), pages 537 and 538, Mr. Edward C. Bailly's article on "Legal Basis of Rate Regulation," 2; *Des Moines* v. *Welsbach Street Lighting Co.*, 188 Fed. Rep. 906; *Ills. Trust & Sav. Bank* v. *Arkansas City*, 76 Fed. Rep. 271.

The reservation of the power to prescribe the manner of fixing rates ought to be construed to be consistent with the other terms of the ordinance, and unless the reserved power to "prescribe the manner of fixing rates" is necessarily in conflict with the other provisions of the ordinance, it ought not to be held to justify the annulment of such other provisions.

Before a reserved power can justify the abrogation of an express grant from the same authority, it must clearly appear that the exercise of the reserved power will necessarily conflict with the grant. *Jack* v. *Grangeville*, 9 Idaho, 291; *Cordwal* v. *American Bridge Co.*, 113 U. S. 205, and *L. & N. R. Co.* v. *Mottley*, 219 U. S. 31, bear but remotely upon the question. *Wolf* v. *New Orleans*, 103 U. S. 358, distinguished.

The commissioners to be appointed under § 2839 must be taxpayers of the city, and even those which the plaintiff in error may select must be taxpayers; such a commission could not be a fair, impartial and unprejudiced tribunal. *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U. S. 274, does not apply, as in that case the city council or governing body were given such power.

All the questions involved are now before this court, which possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired. *Columbia W. R. Co.* v. *Columbia*, 172 U. S. 475.

The Federal question involved has not been so often decided that it is no longer a substantial question in this court. Nothing in the decisions of this court is conclusive upon the questions. *Tampa Waterworks Co.* v. *Tampa*,

199 U. S. 241; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 465, do not apply.

The refusal of the Supreme Court of Idaho to sustain a plea of *res judicata*, based on a judgment of the Circuit Court of the United States for the District of Idaho, presents a Federal question, under the "full faith and credit" clause of the Constitution, and under § 709, Rev. Stat. *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 185; *Dowell* v. *Applegate*, 152 U. S. 327; *Aurora City* v. *West*, 7 Wall. 82 at 106.

That court decided that § 2839 was not enforceable as against the provisions of Ordinance 86; and that decision became the law of the case as between the parties—*res judicata*. By that decision the plaintiff in error became better assured of his right, and confirmed therein. A judgment of dismissal on demurrer, with no limitations placed thereon, is a judgment on the merits. *Durant* v. *Essex Co.*, 7 Wall. 107; *Forsyth* v. *City of Hammond*, 166 U. S. 506; *Baker* v. *Cummings*, 181 U. S. 125; *Aurora City* v. *West, supra; Swan Land & C. Co.* v. *Frank*, 148 U. S. 612.

Mr. D. Worth Clark, with whom *Mr. Jesse R. S. Budge*, *Mr. Aldis B. Browne*, *Mr. Alexander Britton* and *Mr. Evans Browne* were on the brief, for defendant in error.

Memorandum opinion by direction of the court. By Mr. Justice Holmes.

This was an application by the defendant in error for a mandate requiring the plaintiff in error, Murray, to appoint commissioners to act with commissioners appointed by the city in determining water rates to be charged by Murray. Murray relied upon an ordinance of June 6, 1901, as establishing by contract the only method of fixing rates. The city relied upon a subsequent statute, § 2839, Rev. Code. The Supreme Court of the State held that the

constitution in force when the ordinance was passed made it impossible for the city to make a contract on the matter beyond the power of the legislature to change. The constitution declared the use of waters distributed for a beneficial use to be a public use and subject to the regulation and control of the State, and also declared the right to collect rates for water to be a franchise that could not be exercised except by authority of and in the manner prescribed by law. It then ordained that the legislature should provide by law the manner in which reasonable maximum rates might be established. Article 15, §§ 1, 2, 6. The court relied upon *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 211 U. S. 265, and *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467, which so far sustain its conclusion that we think further discussion unnecessary. We are not prepared to overrule the construction of the legislative power as continuing and irrevocable adopted by the Supreme Court of the State.

A defence more relied upon was *res judicata*. In 1909 the city brought a bill in equity in the Circuit Court seeking to have the court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. Rep. 382. In the opinion, it is true, the court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided and the only point that could be decided was that the demurrer should be upheld and that the court was without jurisdiction to "take upon itself the exercise of the 'legislative or administrative' power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years." 173 Fed. Rep. 385. The

demurrer excludes a decision upon the merits, and even if the decree referring to it did not have the same effect by itself, the opinion to which the decree also refers would show the same thing. Of course if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co.* v. *Wilfong*, 223 U. S. 543, 559, and when jurisdiction to grant equitable relief was denied the ground of the merits could not be reached. In *Forsyth* v. *Hammond*, 166 U. S. 506, jurisdiction had been taken in the earlier decision relied upon. Here it was refused.

Judgment affirmed.

UNITED STATES *v.* READING COMPANY.

TEMPLE IRON COMPANY *v.* UNITED STATES.

READING COMPANY *v.* UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 198, 206, 217. Argued October 10, 11, 1911.—Decided December 16, 1912.

The United States filed a bill to enforce the provisions of the Sherman Anti-trust Act of July 2, 1890, against an alleged combination of railroad and coal mining companies formed to restrain competition in the production, sale and transportation in interstate commerce of anthracite coal. The bill alleged a general combination through an agreement between the carrier defendants to apportion the coal tonnage between themselves on a scale of percentages; a combination through the medium of one of the mining companies to prevent the construction of a new competing coal carrying road from the anthracite district to tide-water; a combination by a series of identical contracts with independent coal operators for sale of their total product; and certain contributory combinations between some but not all of the defendants. The bill was filed prior to the enactment

of the Commodities Clause of the Hepburn Act of June 29, 1906. *Held* that:

Any relief against a continuance of the transportation of carrier owned coal under the Commodities Clause must be sought in a proceeding based upon that act and cannot be obtained in this suit.

On the record in this case, this court agrees with the court below that the Government has failed to show any contract or combination for the distribution of coal tonnage between the carriers.

The defendants did combine to unreasonably restrain interstate commerce in violation of the Sherman Anti-trust Act through the Temple Iron Company to prevent the construction of the competing coal carrying railroad.

Although a combination has succeeded in accomplishing one of the purposes for which it was formed, if it is still an efficient agency to prevent competition in other methods, the court may proceed to judgment and decree its dissolution.

A disclaimer on the part of defendants of power of any one of them to control business of the others cannot detract from the significance of documentary evidence bearing on the relations of the defendants to each other.

Although separate acts of the defendants may be legal under the state law when considered alone, they may, when taken together, become parts of an illegal combination under the Anti-trust Act which it is the duty of the court to dissolve.

Acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 206.

While no one of a number of contracts considered severally may be in restraint of trade, each of a series of innocent contracts may be a step in a concerted criminal plot to restrain interstate trade, and, if so, may thereupon become unlawful under the Anti-trust Act. *Swift & Co.* v. *United States*, 196 U. S. 375.

In this case *held* that a series of identical contracts between interstate carriers with a great majority of the independent coal operators to market all the coal of the latter for all time at an agreed percentage of tide-water price were all parts of a concerted scheme to control the sale of the independent output and were unreasonable contracts in restraint of interstate trade within the prohibition of the Sherman Act.

Where, as in this case, purchase and delivery within a State is but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose, it is an interference with and restraint of interstate commerce. *Loewe* v. *Lawlor*, 208 U. S. 274.

While the Sherman Act does not forbid or restrain the power to make

usual and normal contracts to further trade through normal methods, whether by agreement or otherwise, *Standard Oil Co.* v. *United States*, 221 U. S. 1, it does forbid contracts entered into according to a concerted scheme, as in this case, to unduly suppress competition and restrain freedom of commerce among the States.

While the law may not compel competition, it may remove illegal barriers resulting from illegal agreements, such as those involved in this case, which make competition impracticable.

Whether a particular act or agreement is reasonable and normal or unreasonable may in doubtful cases turn upon intent, and the extent of control obtained over the output of a commodity may afford evidence of the intent to suppress competition.

Where there is no doubt that the necessary result of an act is to materially restrain trade between the States, intent is of no consequence.

In a suit to restrain all defendants from carrying out an illegal combination under the Sherman Act in which all defendants participated, the court will not consider minor combinations between less than all of the defendants which did not constitute part of the general combination found to be illegal. To do so would condemn the bill for misjoinder and multifariousness.

In this case the court expresses no opinion on such minor combinations and as to them the bill should be dismissed without prejudice.

183 Fed. Rep. 427, affirmed in part and reversed in part.

THE facts, which involve the legality under the Sherman Anti-trust Act of certain combinations of railroad and coal mining companies engaged in the production, sale and transportation in interstate commerce of anthracite coal, are stated in the opinion.

Mr. J. C. McReynolds, with whom *The Attorney General* and *Mr. G. Carroll Todd* were on the brief, for the United States:

The interests of defendant railroads in the shares of coal owning and producing companies and in anthracite coal lands acquired since January 1, 1874, are held in violation of the constitution of Pennsylvania.

Constitution of Pennsylvania, adopted November 3, 1873, effective January 1, 1874, Art. XVII, § 5; *Int. Com.*

Comm. v. *Phila. & Reading Ry. Co.*, 123 Fed. Rep. 969; *Lehigh Valley R. Co.* v. *Rainey*, 112 Fed. Rep. 487; *Stockton* v. *Central R. R. of N. J.*, 50 N. J. Eq. 52; *Farmers' Loan & Trust Co.* v. *New York &c. R. Co.*, 150 N. Y. 410, 430; *York &c. R. Co.* v. *Winans*, 17 How. 31, 40. *Commodities Clause Case*, 213 U. S. 366, is not in conflict with the view that a railroad owning substantially the entire capital stock of a coal mining company is "directly or indirectly" engaged in mining within the meaning of the Pennsylvania constitution.

Where a coal company is run as a department of the railroad, the latter has an "interest, direct or indirect," in the mining, even within the restricted sense of those words in the commodities clause. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257.

Conceding that prior to January 1, 1874, the legislature of Pennsylvania had authorized railroads, either in their own names or indirectly through holding the stock of and controlling coal mining companies, to engage in mining coal for transportation over their own lines, it was yet within the power of the people of that State to provide in their new constitution, all existing laws and charters to the contrary notwithstanding, that no railroad not then so engaged in mining coal should thereafter be permitted to do so; that the authority once granted, whether by general or special law, in so far as it remained unexecuted, was then and there repealed. *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646; *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S. 677.

All rights and privileges granted to corporations in Pennsylvania since 1857 were taken expressly subject to revocation, excepting in so far as they might become executed. Pennsylvania constitution of 1790, as amended in 1857, Art. I, § 26; 1 Brightly's Purdon's Dig. Pa. L., 10th ed., p. 24; *Pennsylvania Railroad* v. *Duncan*, 111 Pa. St. 352, 361; *Hays* v. *Commonwealth*, 82 Pa. St. 518.

As to the limitation upon the right to alter or revoke expressed in the clause, "in such manner, however, that no injustice shall be done to the corporators," see *Bienville Water Co.* v. *Mobile*, 186 U. S. 212, 222.

It makes no difference whether the shares of a mining company are purchased at a judicial sale rather than a private sale, since the constitution makes no distinction between the two modes. *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S. 677, 692.

It could not obtain by transfer from its predecessor the latter's right (if any it had) to hold the stock of coal mining companies in Pennsylvania if the constitution or laws of Pennsylvania then prohibited such stockholding by a railroad. *Atlantic & G. Ry. Co.* v. *Georgia*, 98 U. S. 359; *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 U. S. 465; *Keokuk &c. R. Co.* v. *Missouri*, 152 U. S. 301, 308–310; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161, 171; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 1, 18–21; *Yazoo & M. V. R. Co.* v. *Vicksburg*, 209 U. S. 358, 362.

It is enough that the railroad acquired the shares after January 1, 1874.

No corporation can receive, by transfer from another, an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the constitution or laws of the State then applicable; and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. *Rochester R. Co.* v. *Rochester*, 205 U. S. 236, 254; *Yazoo & M. V. R. Co.* v. *Vicksburg*, 209 U. S. 358; *Great Northern Ry. Co.* v. *Minnesota*, 216 U. S. 206.

Commonwealth v. *New York, L. E. & W. R. Co.*, 132 Pa. St. 591, distinguished.

Where a railroad lawfully engaged prior to January 1, 1874, in mining coal, either in its own name or through a subsidiary company, has since that date, in its own name or through a subsidiary company, aequired and mined

additional coal lands and so become further engaged in mining, such lands are held in violation of the Pennsylvania constitution.

Railroads engaged, as defendants are, in transporting coals of the same kind from a sole and restricted area of production to the principal market, are competitive, although their tracks may not reach the same mines.

Whether railroads are competitive is a question of mixed law and fact. *State* v. *Vanderbilt*, 37 Oh. St. 590; *United States* v. *Union Pacific R. Co.*, 188 Fed. Rep. 102, 113; *Kimball* v. *Atchison &c. R. R.*, 46 Fed. Rep. 888, 890.

Mr. John G. Johnson and *Mr. Adelbert Moot*, with whom *Mr. Charles Heebner*, *Mr. Frank H. Platt*, *Mr. Robert W. De Forest*, *Mr. Jackson E. Reynolds*, *Mr. George F. Brownell* and *Mr. William S. Jenney* were on the brief, for certain railroad corporations, appellants in No. 217 and appellees in No. 198:

The general charge of the petition, that since 1896 the original defendant railroad companies and coal companies have combined and conspired to stifle competition in and monopolize trade and commerce among the States in anthracite coal, was not sustained by the Government, and that charge was properly dismissed by the unanimous decision of the Circuit Judges.

The testimony offered by the Government, relating to the Board of Control agreement of 1876, the meetings of certain railroad officers from 1884 to 1887, and the leases in 1892 of the Lehigh Valley and Jersey Central railroads to the Philadelphia & Reading Railroad Company, did not constitute legal evidence of the general conspiracy alleged to have existed from 1896 to 1907, nor of any of the five particular conspiracies alleged to have been entered into in furtherance of such general conspiracy.

The claim of the Government that about 1896 an agreement was entered into for a division of the coal tonnage,—

the so-called "Presidents' Percentages,"—and that such percentage agreement was continuously maintained thereafter, was not sustained by the evidence.

The acquisition in 1898 by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Compay constituted no evidence that the defendant railroad and coal companies were in the alleged general conspiracy to stifle competition in trade and commerce in anthracite coal.

The acquisition in 1899 of the Simpson and Watkins collieries by The Temple Iron Company, in which some of the defendants were interested, constituted no evidence that the defendants were engaged in the alleged general conspiracy.

The acquisition in 1901 by the Erie Railroad Company of the capital stock of the Pennsylvania Coal Company furnished no evidence of the alleged general conspiracy.

The acquisition in 1901 by the Reading Company of a majority of the capital stock of the Central Railroad Company of New Jersey furnished no evidence that the defendants were engaged in the general conspiracy alleged.

It was no proof of the alleged general conspiracy, that certain of the defendant railroads purchased minor interests in the capital stock of the Lehigh Valley Railroad Company, and afterwards sold the same at a profit.

It was no proof of the general conspiracy alleged, that in 1905 the Lehigh Valley Railroad Company purchased the interests of Coxe Brothers & Company in a branch line of railroad and in certain coal mining properties on such branch line.

The acquisition of coal lands from time to time by the defendants constituted no evidence of the general conspiracy alleged.

There was no evidence of an agreement or conspiracy to establish or to maintain uniform sales prices or uniform transportation rates.

As to the 65% contracts, the only issue presented by the pleadings is whether they were entered into in pursuance of an agreement or conspiracy between the original defendants to restrain interstate commerce.

The history of these contracts should satisfy this court, as it did the majority of the Circuit Judges, that these contracts did not arise from any desire to terminate a trade war or other competitive conditions, that they were not framed either as the result of any combination or with any object or intent to stifle or obstruct either the production or sale of coal, that they have not had the effect of restricting commerce in coal, and that, on the contrary, they were framed with honest purposes, to establish fair methods of conducting business and that they have resulted in the promotion and increase of commerce.

The 65% contracts are not, in themselves, unlawful and unreasonable restraints of interstate trade and commerce. Those contracts are intrastate, and not interstate contracts; they do not affect interstate commerce, except indirectly and incidentally, and so are not violative of the Anti-trust Act.

Mr. James H. Torrey for certain coal mining corporations, appellants in No. 217 and appellees in No. 198:

The 65% contracts do not concern directly interstate commerce and are, therefore, not cognizable in this proceeding.

The position taken by the Government requires as prerequisite of a decree for the cancellation of the 65% contracts, the association in purpose or intention of these defendants with the conspiracy or combination in restraint of trade, which it is charged rendered those contracts illegal. No such association is established either by the pleadings or proof.

So far as concerns these defendants, the 65% contracts are perfectly honest, straightforward and legitimate sales

of coal, untainted by any ulterior or illegal purpose or design.

As to both contracting parties, sellers and buyers, the 65% contracts are *bona fide* transactions for the sale of the product of the particular collieries involved, untainted by any ulterior or illegal purpose or design.

Mr. James H. Torrey and *Mr. William S. Opdyke* filed a brief for appellee, The Delaware & Hudson Company:

The Delaware & Hudson Company has never been a party to any combination for the establishment of a monopoly or for the restraint of interstate commerce, in respect of the production, sale or transportation of anthracite coal.

The contracts made by the Delaware & Hudson Company with the Hillside Coal & Iron Company for the sale of anthracite coal in limited amounts and in limited periods to the Hillside Coal and Iron Company, violated no law of the United States.

These contracts for the sale of coal in the State of Pennsylvania, and all deliveries under such contracts were made in the State of Pennsylvania. They were therefore purely intrastate contracts, both made and performed within the State of Pennsylvania. They did not directly relate in any way to interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557, 565; *Kidd* v. *Pearson*, 128 U. S. 1, 24; *United States* v. *Knight*, 156 U. S. 1, 13; *Hopkins* v. *United States*, 171 U. S. 578, 592, 593, 598, 603; *Anderson* v. *United States*, 171 U. S. 604; *Addyston Pipe Case*, 175 U. S. 211, 247; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 623; *Bigelow* v. *Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The United States is not entitled to ask for the entry of any decree, by way of injunction or otherwise, against The Delaware and Hudson Company.

The present proceeding is under a statute of a penal

character requiring the strictest proof. *Northern Securities Case*, 193 U. S. 197, 401.

The absolute freedom of this defendant to make contracts for a sale of a portion, or even of all, its production of anthracite coal to anyone or in any form it sees fit, is one which cannot be taken away from it by any statute of a State or of the United States.

In the absence of any proof that such sale was upon the part of The Delaware and Hudson Company a portion of an illegal combination to which it was itself intentionally a party, the company is entitled to enforce such contract against the other party thereto, and that right cannot be taken away from it without its consent, no question of police power being involved. *Tracy* v. *Talmage*, 14 N. Y. 162, 167; *Ganson* v. *Tifft*, 71 N. Y. 48, 57; *Graves* v. *Johnson*, 179 Massachusetts, 53; *National Distilling Co.* v. *Cream City Importing Co.*, 86 Wisconsin, 356; *Metcalf* v. *American School Furniture Co.*, 122 Fed. Rep. 115, 120; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. Rep. 439, 442; *Adams* v. *Coulliard*, 102 Massachusetts, 167; *Connolly* v. *Sewer Pipe Co.*, 184 U. S. 540.

Mr. William W. Green, filed a brief for appellee, The Mercantile Trust Company.

Mr. Adelbert Moot and *Mr. George F. Brownell* filed a brief for the Erie Railroad Company, appellee:

The United States failed to show that the Erie Railroad Company, or the stockholders of the New York, Susquehanna & Western Railroad Company, or the stockholders of the Pennsylvania Coal Company, or any other person or corporation, intended "restraint of trade or commerce," or to "monopolize or attempt to monopolize any part of trade or commerce," and therefore the court below unanimously and properly dismissed the petition upon the merits upon the facts.

The defendants' evidence and exhibits affirmatively disprove the charge of either general or special conspiracies to violate either §§ 1 or 2 of the act, and show, instead, that each purchase of stock in question was made by the Erie Railroad Company for proper and lawful business reasons under authority of its charter and the legislation of the States of New York, Pennsylvania and New Jersey, respectively.

The full constitutional and exclusive power of the National Government by executive officers, legislative acts and judicial decrees to regulate interstate commerce is admitted. This does not make the purchase of those stocks interstate commerce or illegal under the Sherman Anti-trust Act, because: The New York, Susquehanna & Western Railroad Company was never a parallel and competing line of the Erie Railroad Company, nor was it in such financial or physical position to compete at the mines or elsewhere, as to enable the Erie Railroad Company to cause restraint or monopoly of interstate trade contrary to such statute.

The Erie Railroad Company, the Pennsylvania Coal Company, and its railroad, the Erie and Wyoming Railroad, had been duly authorized to enter into contract and traffic relations with each other. They had done so; such contracts were not prohibited by Federal law, nor are they now, and such contract relations, begun over 40 years before the stock purchase, still existed, and would continue until at least January 1, 1911; therefore, the acquisition of the stock of such companies by the Erie Railroad Company, to give it further control over a connecting railway in Pennsylvania that was an old and natural connection and feeder, and of the tonnage it was built to serve, more than forty years before, the stock purchase, for the same purpose was lawful. Bosman, 5 R. 1014 R.; Thomas, 5 R. 1121–2; *R. R. Co.* v. *R. R. Co.*, 171 Pa. St. 284; *A. F. &c. R. R. Co.* v. *Denver &c. R. Co.*, 110 U. S. 667; *Cin. R. R.*

Co. v. *Int. Com. Comm.*, 162 U. S. 184, 197; *L. & N. R. Co.* v. *West Coast N. S. R. Co.*, 198 U. S. 483; *So. Pac.* v. *Int. Com. Comm.*, 200 U. S. 536–554.

The petition, as we have heretofore pointed out, does not allege that the Pennsylvania Coal Company stock purchase was a "step" in the general conspiracy charged, as it does in other cases; nor does it allege any vice in the purchase, except that the stock was purchased at an "exorbitant" price, and thereby a proposed railroad wholly in the State of New York lost its most influential backer and was never built.

No relief was asked for under this petition, which failed to even state a case within the statute. The Government evidence wholly failed to establish an "exorbitant" price; but the contrary was the undisputed fact. No interstate, or parallel, or competing, railroad was involved, but only a Pennsylvania connection which had been a feeder of over forty years' standing and its tonnage. There was no intent to violate the law, and it was not violated.

Mr. Everett Warren for Temple Iron Company, appellant in No. 206:

The Temple transactions were not for the purpose of preventing the construction of another interstate carrier of anthracite, even if it is assumed that the independents by securing the charter of the New York, Wyoming & Western contemplated reaching tide-water by the utilization of that proposed road as a means, but were for the purpose of retaining to the carriers the tonnage of the so-called Simpson & Watkins collieries they then enjoyed under lawful contracts, beyond any hazard of a threatened, or supposedly threatened diversion. In other words, it was a measure of defense, not offense, the purposes and intent of which was to fortify and make sure an already impregnable legal position.

The projected road was an intrastate road and nothing else, and if it is assumed that the contemplated purchase of the Simpson & Watkins collieries defeated its construction, and the proofs show the contrary, the purchase did not have any effect upon interstate trade or commerce.

Simpson & Watkins were not the principal supporters of the projected intrastate road. The road itself was a visionary enterprise entirely impracticable and its abandonment was due to other causes than the acquisition by The Temple Iron Company of the Simpson & Watkins collieries.

The charges in the Government's petition, namely, the high price paid for the Simpson & Watkins properties and the little value standing alone of the stock and bonds of The Temple Company, were without foundation of fact to rest upon and were disproven in the Government's own case.

There never was contemplated any pooling or division of the tonnages moving from the Simpson & Watkins collieries among the railroad stockholders of The Temple Company serving the region where these collieries were situated, much less any pooling and division of such tonnage as a fact.

The history of the management and development of the Temple anthracite operation since February, 1899, as it is undisputed and appears in the Government's own case, discloses a careful, business-like conduct of its affairs in line with and following out the plain purpose of its entrance into the anthracite field, namely, to make money out of its mines for its stockholders as independent coal operators. Its transactions are altogether within the State of Pennsylvania and end there.

The Temple transaction had and could have no bearing upon interstate trade or commerce under the actual situation of affairs; are not within the provisions of the Anti-

trust law, nor indeed within the constitutional authority of Congress.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a petition in equity filed by the United States in the Circuit Court of the United States for the Eastern District of Pennsylvania, for the purpose of enforcing the provisions of the act of July 2, 1890, known as the Sherman Anti-trust Act, against an alleged combination of railroad and coal mining companies formed and continued for the purpose of restraining competition in the production, sale and transportation of anthracite coal in commerce among the States.

The defendants originally made such, and alone referred to hereafter as the defendants, were the following:

The Philadelphia & Reading Railway Company; The Philadelphia & Reading Coal and Iron Company; The Lehigh Valley Railroad Company; The Lehigh Valley Coal Company; The Delaware, Lackawanna & Western Railroad Company; The Central Railroad Company of New Jersey; The Erie Railroad Company; The New York, Susquehanna & Western Railroad Company; The New York, Susquehanna & Western Coal Company; The Lehigh & Wilkes-Barre Coal Company; The Pennsylvania Coal Company; The Hillside Coal Company; The Reading Company and the Temple Iron Company. By an amendment certain other defendants were brought in, consisting of holders of contracts made by independent operators of coal mines, and trustees holding securities which might be affected by the relief sought against the carrier and coal mining companies, the original defendants. A list of these later defendants is set out in the margin,[1] and when they are referred to herein they will be specifically mentioned.

[1] The Delaware & Hudson Company; Elk Hill Coal & Iron Company; St. Clair Coal Company; Enterprise Coal Company; Buck Run

The bill alleges that anthracite coal is an article of prime necessity as a fuel and finds its market mainly in the New England and Middle Atlantic States. The deposits of the coal, with unimportant exceptions, lie in the State of Pennsylvania, but do not occupy a continuous field, though found in certain counties adjoining in the eastern half of the State, and embrace an area of 484 square miles. This coal region is from one hundred and fifty to two hundred and fifty miles from tide-water. The region itself is broken and mountainous, and the natural conditions and character of the deposits are such that the mining and reduction of the coal to suitable sizes for domestic use require very large amounts of capital. Its value commercially is dependent, in a large degree, upon quick and cheap transportation to convenient shipping points at tide-water, from whence it may be distributed to the great consuming markets of the Atlantic Coast States.

The whole problem of advantageously developing these deposits and supplying the eastern demand for fuel was one which presented enormous difficulties. From an early day it has been the settled policy of the State of Penn-

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Coal Company; Llewellyn Mining Company; Clear Spring Coal Company; Pancoast Coal Company; Price-Pancoast Coal Company; Mount Lookout Coal Company; Peoples Coal Company; George F. Lee Coal Company; North End Coal Company; Melville Coal Company; Parrish Coal Company; Red Ash Coal Company; Raub Coal Company; Mid Valley Coal Company; Austin Coal Company; Clarence Coal Company; Nay Aug Coal Company; Green Ridge Coal Company; Excelsior Coal Company; Lackawanna Coal Company; Dolph Coal Company, Limited; Mary F. W. Howe, Frank Pardee, and Sarah Drexel Van Rensellaer, constituting A. Pardee & Co.; Lafayette Lentz, William O. Lentz and Lewis A. Riley, constituting Lentz & Company; William Law and John M. Robertson, constituting Robertson & Law; Richard White, W. R. McTurk and Robert White, constituting E. White Company; Joseph J. Jermyn, George B. Jermyn, Emma J. Jermyn, constituting John Jermyn Estate; Joseph J. Jermyn, Michael F. Dolphin; The Pennsylvania Company for Insurance on Lives and Granting Annuities; and the Mercantile Trust Company.

sylvania to encourage the development of this coal region by canal and railroad construction, which would furnish transportation to convenient shipping points at tidewater. One of the defendant carriers, the Delaware, Lackawanna & Western Company, was given the power to acquire coal lands and engage in the business of mining and selling coal in addition to the business of a common carrier, and all railroad companies were permitted to aid in the production of coal by assisting coal mining companies through the purchase of capital stock and bonds. Thus, it has come about that the defendant carriers not only dominate the transportation of coal from this anthracite region to the great distributing ports at New York harbor, but also through their controlled coal-producing companies, produce and sell about seventy-five per cent. of the annual supply of anthracite. As a further direct consequence of the state authorized alliance between coal-producing and coal-transporting companies, it has come about that the defendant carrier companies and the coal-mining companies affiliated with the carrier companies now own or control about ninety per cent. of the entire unmined area of anthracite, distributed, according to the averments of the petition, as follows:

Reading Company	44. %
Lehigh Valley Company	16.87%
Del., Lack. & Western Company	6.55%
Central Railroad of New Jersey	19. %
Erie Railroad	2.59%
N. Y., Sus. & Western Railroad	.54%
	89.55%

It further appears that in addition to the great coal-mining companies subsidiary to one or another of the defendant carrier companies, there are a large number of independent coal operators whose aggregate production

from coal lands, in part leased from the railroad companies or the railroad-controlled coal-producing companies, amounts to about twenty per cent. of the annual anthracite supply. These independent operators are said to no longer have the power to compete with the carrier defendants and their subsidiary coal companies, because a large proportion of them have severally entered into contracts with one or the other of the carrier or coal-mining companies defendant for the sale of the entire product of their mines for the consideration of sixty-five per cent. of the average market price at tide-water.

Thus, there exists, independently of any agreement, combination or contract between the several defendant carrier companies for the purpose of suppressing competition among them, this condition:

First: Excluding two carrier companies not made defendants which reach but a limited number of collieries, the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company, the six carrier companies who are defendants are shown to control the only means of transportation between this great anthracite deposit and tide-water from whence the product may be distributed by rail and water to the great consuming markets of the Atlantic Coast States.

Second: These carriers and their subsidiary coal-mining and selling companies produce and sell about seventy-five per cent. of the total annual supply of anthracite coal. Of the remainder, the independent operators mentioned above produce about twenty per cent.

The chief significance of the fact that the six carrier defendants control substantially the only means for the transportation of coal from the mines to distributing points at tide-water is in the fact that they, collectively, also control nearly three-fourths of the annual supply of anthracite which there finds a market. The situation is therefore one which invites concerted action and makes ex-

ceedingly easy the accomplishment of any purpose to dominate the supply and control the prices at seaboard. The one-fourth of the total annual supply which comes from independent operators in the same region has been sold in competition with the larger supply of the defendants. If, by concert of action, that source of competition be removed, the monopoly which the defendants, acting together, may exert over production and sale will be complete.

This bill avers that the defendants have combined for the purpose of securing their collective grip upon the anthracite coal supply by exerting their activities to shut out from the district any new line of transportation from the mines to tide-water points, and to shut out from competition at tide-water the coal of independent operators with their own coal. The steps said to have been taken having this end in view, we shall now consider:

The community of interest which has resulted from the charter powers of the carrier companies to directly or indirectly engage in the business of mining and selling coal has produced the relation between the carrier and coal-mining defendants shown by the several groups into which we have arranged them, thus:

1. The Reading Company is a Pennsylvania corporation, and apparently nothing more than a holding company. That company holds:

a. The entire capital stock of the Philadelphia & Reading Railway, one of the defendant carriers.

b. The entire capital stock of the Philadelphia & Reading Coal & Iron Company, a coal-mining company.

The three companies have the same president.

2. The Lehigh Valley Railroad Company owns all of the capital stock of the Lehigh Valley Coal Company, and the two companies have the same president.

3. The Central Railroad of New Jersey owns ninety per cent. of the capital stock of the Lehigh & Wilkes-

Barre Coal Company, and the two companies have the same president, who is also the president of the Reading Company and its two controlled companies.

4. The Erie Railroad Company owns all of the capital stock of the Pennsylvania Coal Company and a large majority of the stock of the Hillside Coal Company, and the three companies have the same president.

5. The New York, Susquehanna & Western Railroad Company owns nearly the entire capital stock of the New York, Susquehanna & Western Coal Company, and they have the same president, who is also the president of the Erie Railroad Company and of its two allied coal companies mentioned above.

6. The Delaware, Lackawanna & Western Railroad Company is itself an owner and producer of anthracite and seems to have no subsidiary coal company.

7. The Temple Iron Company. The relation of this company to the several carrier companies will be considered separately.

Excluding the Temple Iron Company the groups as arranged are independent of each other, and each group, in the absence of any agreement or combination, possesses the power to compete with every other in the production, sale and transportation of coal from the mines to tidewater. Indeed, the plain averment of the bill is that prior to 1896 they were actually competing in the market reached at New York harbor, and that the competition continued, except as interrupted by abortive or abandoned efforts to combine, until they entered into the general combination which it is the purpose of this proceeding to dissolve.

That the Delaware, Lackawanna & Western Railroad Company was itself the owner of coal lands and was engaged in mining, transporting and marketing its own coal, and that the other railway defendants were also engaged, through their subsidiary coal companies, in mining and

selling coal, as well as in transporting the coal so mined, is not determinative of any issue here presented, since this bill was filed before the Commodities clause of the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, became effective, which forbids any carrier engaged in interstate transportation from transporting coal for market, when the coal at the time of transportation is owned by the carrier company. See *United States* v. *D., L. & W. R. Co.*, 213 U. S. 366. Any relief against a continuance of such forbidden transportation must, therefore, be sought in another proceeding based upon the act of Congress referred to.

The Scope and Theory of the Bill.

The theory upon which the bill is framed and upon which the case has been presented by counsel is, that there exists between the defendants a *general combination* to control the anthracite coal industry, both in respect of mining and transportation from the mines to the general consuming markets reached from shipping points at New York harbor, and the production and sale of coal throughout the United States.

The contention is that this *general combination* is established, first, by evidence of an agreement between the carrier defendants to apportion between themselves the total coal tonnage transported from the mines to tide-water according to a scale of percentages; second, by a combination between them, through the instrumentality of the defendant, the Temple Iron Company, to prevent the construction of a new and competing line of railroad from the mines to tide-water; third, by a combination between the defendants by means of a series of identical contracts for the control of the coal produced by independent coal operators, thereby preventing competition in the markets of other States between the coal of such independent operators and that produced by the defendants; and,

finally, by certain so-called contributary combinations, already referred to, between some, but not all, of the defendants.

Aside from the particular transactions averred as "steps" or "acts in furtherance" of a presupposed *general combination*, the charge of such a combination is general and indefinite.

The case is barren of documentary evidence of solidarity. The fact of such general combination, if it exists, must be deduced from specific acts or transactions in which the companies have united and from which such a general combination may be inferred. When and how did such a combination come about? We start with the proposition that if any such combination exists it had an origin not earlier than 1896. Attempts to bring about a suppression of competition prior to that time, indicated by some of the evidence, had either proved abortive or had been abandoned. Thus, it is stated that in 1890 and 1891 the price of coal of certain sizes at tide-water was from $3.71 to $3.85 per ton; that in 1892 the Philadelphia & Reading Railroad Company, the predecessor in title of the defendant the Philadelphia & Reading Railway Company, leased the lines of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey for nine hundred and ninety-nine years, and that the three companies together owned or controlled about eighty per cent. of the coal deposits of this anthracite region and transported nearly fifty per cent. of the entire tonnage; that while these leases were in force the price of coal was advanced to $4.15 and $4.19 per ton for the same sizes. It is then averred that in a proceeding in the courts of New Jersey these leases of the Central Railroad Company of New Jersey were held null and void, and that in 1893 this decree was followed by a rescission of the lease of the Lehigh Valley Railroad Company to the Philadelphia & Reading Railroad Company. It is then averred that

under the influence of competition thereby restored, the price of the same grade of coal in 1894 fell to $3.60 per ton and in 1895 to $3.12 per ton. "*Whereupon*," the petition avers, "in violation of the provisions of sections 1 and 2, respectively, of the Act of Congress of July 2, 1890, . . . the defendants, the Reading Company, and the defendant carriers, and the defendant coal companies, owning or controlling 90 per cent., more or less, of all the anthracite deposits, and producing 75 per cent., more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tide-water, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario and Western Railway Company, which, as aforesaid, reach only a limited number of collieries, (not defendants here), entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other States and its price and sale throughout the several States, with the result that competition in the transportation and sale of anthracite has been wholly suppressed and the price thereof greatly enhanced."

1. We come first to the evidence relied upon to show such a general combination through an agreement between the carriers to distribute the total tonnage of coal from this region to shipping points at New York harbor according to a scale of percentages spoken of as the "Presidents' percentages."

There is some evidence tending to show that early in 1896 there was an effort made at a conference of the presidents of the carrier companies to distribute the coal tonnage between the several carriers, based upon the

average percentage of coal carried in prior years by each carrier. The limited character of the coal field, the control of so large a proportion of the deposits and of the transportation, was such as to invite agreements and combinations. A pooling arrangement would largely prevent competition between the otherwise independent groups of carriers and producers. That any such pooling agreement was made is denied most earnestly by all of the defendants. That there occurred a conference in 1896 looking to such an arrangement seems probable on the evidence. But the weight of proof satisfies us that whatever might have been contemplated or attempted, the scheme proved abortive, or, if attempted, was abandoned long before this bill was filed. We do not set out the circumstances which are pointed out as tending to show such an illegal agreement, nor do we deem it necessary to discuss the conflicting direct testimony. We have gone through the record. The facts are discussed and largely set out in the opinion of the court below. Though its judges differed in respect to the relief which might be granted upon other grounds, they agreed in holding that the Government had failed to show any contract or agreement for the distribution of tonnage. In this we concur.

The Temple Iron Company Combination.

2. We come, then, to the several acts, agreements or transactions set out in the seventh paragraph of the bill, two of which are said to have been participated in by all of the defendants, and therefore to constitute evidence of the general combination charged, and to be, in and of themselves, illegal combinations between all of the principal defendants which come under the frame of the bill as in violation of the act of July 2, 1890, 26 Stat. 209, c. 647.

The transactions referred to are introduced immediately following the general charge, and are characterized in the

bill as "steps in the development of this illegal combination and in furtherance of its illegal purposes." It is then averred, that "the defendants, or some of them, became parties to the following additional acts, schemes and contracts, among others, in violation of the aforesaid Act of July 2, 1890." This is followed by five distinct paragraphs, each setting out some distinct contract, combination or agreement alleged to have been the act of all of the defendants, or of two or some number less than all. These alleged "steps" and "additional acts, schemes and contracts," in violation of the Sherman law and in furtherance of the alleged illegal general scheme or purpose,—are: *a.* the making of the sixty-five per cent. contracts with the independent operators; *b.* the absorption by the Erie Railroad of the New York, Susquehanna & Western Railroad Company; *c.* the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad of New Jersey; *d.* the acquisition of the Temple Iron Company, and through it of a large number of collieries, for the purpose of defeating a projected independent line of railway into the coal region; and, *e.* the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all of the shares of the Delaware Valley & Kingston Railroad Company, a projected common carrier, and all of the shares of the Pennsylvania Coal Company.

As we have already stated, two of these transactions are averred to be transactions into which all of the defendants entered in pursuance of a common purpose and general design to suppress competition and restrain commerce in coal between the States.

The first which we shall consider is the alleged combination through the Temple Iron Company. Concerning this, the petition, in substance, states, that in 1898 many of the independent coal operators in the Wyoming or Northern field became dissatisfied with the transportation

and market conditions under which they were obliged to conduct their collieries. Many contracts for the sale of their coal to the defendant coal companies had expired or were about to expire, and they demanded either lower freight rates or better prices from the coal companies. A competing line of railway from the Northern or Wyoming zone of the anthracite region to a point on the Delaware River, where connection would be made with two or more lines extending to shipping points at New York harbor, was projected as a means of relieving the situation. The New York, Wyoming & Western Railroad was accordingly incorporated. Large subscriptions of stock were taken, the line in part surveyed, parts of the right-of-way procured, and a large quantity of steel rails contracted for. As the road was to be mainly a coal-carrying road, support from coal-mining companies was essential. Its chief backing came from independent coal operators. The most important and influential of them was the firm of Simpson & Watkins, who controlled and operated eight collieries in the region, having an annual output of more than a million tons. The time for such a competing means of transportation was auspicious. Much of the output of the district not tied up by contracts of sale or transportation was pledged to this project and much more was promised.

The petition alleges that the construction of the projected independent railroad would not only have introduced competition into the transportation of anthracite coal to tide-water, but it would have enabled independent operators reached by it to sell their coal at distributing points in free competition with the defendant coal companies. "*Wherefore*," avers the pleading, "the defendants, the Reading Company, owning the entire capital stock of the Philadelphia & Reading Railway Company, and the other carrier companies defendants herein, controlling collectively all means of transportation between the mines

and shipping points at New York harbor, combined together for the purpose of shutting out the proposed railroad and preventing competition with them in the transportation of coal from the mines to other States, and the sale of coal in competition with their own controlled coal in the markets of other States." The plan devised was to detach from the enterprise the powerful support of Simpson & Watkins and the great tonnage which their coöperation would give to the new road, by acquiring for the combination the coal properties and collieries controlled by that great independent firm of operators. This would not only strangle the project, but secure them forever against new schemes induced by the large tonnage produced by these eight collieries, and secure not only that tonnage for their own lines, but keep the coal forever out of competition with that of their controlled coal-producing companies.

The scheme was worked out with the result foreseen and intended. The capital stock of the Temple Iron Company, aggregating only $240,000, was all secured. That company was then operating a small iron furnace near Reading. Its assets were small, but its charter was a special legislative charter which gave it power to engage in almost any sort of business, and to increase its capital substantially at will. Control of that company having been secured, it was used as the instrument for the purpose intended.

The plan by which the defendant carriers were enabled to carry out this scheme and apportion among themselves proportionate interests in the property acquired and the burden to be assumed was not simple, but elaborate. The financial arrangements seem to have been made through Mr. Baer, who was the president of and a large stockholder in the Temple Company, and Mr. Robert Bacon, of the firm of J. P. Morgan & Company. Shortly stated, it was this: The Temple Company increased its

capital stock to $2,500,000 and issued mortgage bonds aggregating $3,500,000. Simpson & Watkins agreed to sell to the Temple Company their properties for something near $5,000,000. They accordingly transferred to the Temple Company the capital shares in the several coal companies, holding the title to their eight collieries, and received in exchange $2,260,000 in the shares of the Temple Company, and $3,500,000 of its mortgage bonds. By contemporaneous instruments Simpson & Watkins transferred to the defendant, the Guaranty Trust Company of New York, as trustee, this capital stock and $2,100,000 of the bonds of the Temple Company, and received from the Guaranty Company, $3,238,396.66 in money and $1,000,000 in certificates of beneficial interest in the stock of the Temple Company. The Guaranty Company seems to have been but a medium and was accordingly protected by a contemporaneous contract with the Reading Company and the other carrier defendants by which they severally contracted with the Guaranty Company to purchase the Temple Company's capital stock in a certain agreed proportion or percentage of the total capital stock, and to guarantee the bonded debt of the Temple Company in the same proportion. A large proportion of the bonds and of the beneficial certificates of interest in stock of the Temple Company was later guaranteed, or underwritten as the stock phrase goes, by a syndicate including J. P. Morgan, William Rockefeller, the Guaranty Company and others.

Thus, it came about that when this bill was filed the stock of the Temple Company, which, as seen, is a mere holding company for the several defendant carrier companies, was owned by the defendants, and the obligations of that company were guaranteed by them in proportions based on the percentage of the total anthracite tonnage carried annually by each of the defendant carriers, namely: The Reading Company and the Reading Rail-

way Company, being treated as one and the same in this matter, 29.96%; the Lehigh Valley Railroad Company, 22.88%; the Central Railroad of New Jersey, 17.12%; the Delaware, Lackawanna & Western Railroad Company, 19.52%; the Erie Railroad Company, 5.84%; the New York, Susquehanna & Western Railroad Company, 4.86%. At the time this proof was taken the average annual output of the collieries thus acquired was about 1,600,000 tons, and in the last year the output had arisen to 1,950,000 tons. This combination of the defendants through the Temple Iron Company was effective in bringing about the designed result. The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained.

The projected competing railroad was undoubtedly a good faith proposition and held out promise to independent coal operators not only of the prospect of competition in transportation from the mines to tide-water, but the possibility of selling their coal either to the controlled coal companies defendant at better prices or to the consuming public at tide-water in competition with that of the controlled coal companies. But if we assume that its construction was doubtful, the result must be the same as characterizing the purpose and design of the concerted action of the defendants. They were so far convinced of the threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

That the collieries to be reached by the new road were not all reached by each of the defendants is true. The great bulk of tonnage from them seems to have been carried by the Erie, the Lehigh and the Lackawanna. But the preservation of the monopoly of transportation

from the mines to tide-water held by the six lines which were serving the region, was plainly a common interest,—a collective monopoly by which the profits in coal could be secured and the monopoly maintained by shutting out any new line to tide-water. The extent of the interest of each in the desired result seems to have been estimated by themselves as fairly measured by the percentage of the total tonnage theretofore carried annually by each. Thus it was that they became owners of the shares in the Temple Company, and guarantors of its obligations in the same porportions.

It has been suggested that since the New York, Wyoming & Western Railroad has been effectively strangled that it will be idle to enjoin the doing of an act already accomplished. But that is a narrow view of the relief which may be granted under the statute and the frame of this bill.

The combination by means of the Temple Company still exists. It has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other States.

That under the law of Pennsylvania each of the defendant carrier companies has the power to acquire and hold the stock of coal-producing companies may be true. That the Temple Company may, under the same law, have the power to acquire and hold the capital stock of the Simpson & Watkins' collieries may also be conceded. But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other States, and adopted as a means for that purpose the Temple Company, and, through it, the control of the great Simpson & Watkins' collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination

under the Federal statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held. *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291. So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further suppression of competition. Through it, the defendants, in combination, may absorb the remaining output of independent producers. The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production, is true. But in the power which each other group would have to compete would be found a corrective. The statute forbids the concerted action which has already brought about the strangling of a projected competing railroad and the complete control of the sale of an immense tonnage of independent coal which had prior thereto not only been a menace to their collective control of the means of transportation to New York harbor points, but a large competing factor in sales at these points. The Temple Company, therefore, affords a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued beyond the mere operation of the Simpson & Watkins' collieries.

Its board of directors includes the presidents of the defendant carriers, who also are the presidents of the defendant coal companies, and these defendant companies absolutely dominate its affairs. The Temple Company also owns and dominates the great collieries obtained from Simpson & Watkins. Its board of directors, composed as it is of men representing the defendants, supplies time, place and occasion for the expression of plans or combinations requiring or inviting concert of action. Though as a board it may not dictate the activities of

the owning corporations, still, in view of the relation of the Temple Company to the defendant carriers and their respective coal-mining companies, and of the constitution of its directors, the attitude of its board as indicated by the proceedings spread upon the corporate minutes is of significance upon the question of the existence of any concerted purpose to unite the activities of its corporate owners to suppress competition. There are to be found on the minutes of the Temple Company a number of entries which point strongly to combinations between the defendants. Thus, on June 27, 1899, a committee was appointed to consider the establishment of a statistical bureau, "to keep a record of all matters of interest to the anthracite companies." What resulted does not appear from any further minutes. On July 2, 1901, a resolution in these words was adopted:

"*Resolved*, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent. rate to outside shippers, or a flat rate, and, if so, what rate."

By "outside shippers" the witness says was meant "independent operators," who shipped their own coal. The witness by whom this action was proved says that he never saw the report and does not know that any was made by the committee. It is true that Mr. Baer, the president of the Temple Company, denied that the Temple Company had or undertook to exercise any power in respect of carrier rates, or in fixing prices of coal. He says that the minute entries referred to above are matters "interjected by somebody," under a misconception of the powers and duties of the directors of that company, and came to nothing. That he shortly took the presidency himself and that the Temple Company "has been run as the most harmless mining company in the State of Pennsylvania," and has had nothing to do with the

price of coal or with rates for transportation. But this disclaimer of power does not detract from the significance of the minutes of the Board referred to as evidence bearing upon the question of the relation of the several defendants to each other.

We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the Act of Congress of July 2, 1890.

3. We come now to the sixty-five per cent. contracts.

The charge of the petition in respect to these contracts is substantially this:

a. That the defendant carriers possessed a substantial monopoly of all of the means of transportation between the coal region and tide-water.

b. That they directly or indirectly through their controlled coal companies produced about seventy-five per cent. of the annual supply of anthracite coal.

c. That twenty per cent. or more of the annual supply was produced by independent operators, whose collieries were located contiguous to the carrier lines of the defendant companies.

d. This being the situation, it is charged, that for the purpose of preventing the output of these independent producers "from being sold throughout the several States in competition with the output from their own mines, or of the mines of their subsidiary coal companies, the said defendant carriers, having almost a complete monopoly of the means of transportation between the anthracite mines and tide-water, entered into and now maintain an agreement, combination or conspiracy to use their power as said carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several States, particularly

of the great distributing market at New York harbor, in violation of the aforesaid Act of July 2, 1890."

It is further averred:

e. That prior to 1900 the defendants "severally made" a large number of short term contracts for the purchase of the coal of independent operators "along their respective lines," at prices ranging from fifty-five to sixty per cent. of the average price at tide-water.

That upon the termination of these contracts the defendants "in pursuance of a previous agreement between themselves, severally offered to make and did make and conclude with nearly all of the independent operators along their lines new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another," by which such operators "severally agreed" to deliver on cars at breakers "to one or the other of the defendant carriers, or its subsidiary coal company, all the anthracite coal thereafter mined from any of their mines now opened and operated, or which they might thereafter open and operate, deliveries to be made from time to time as called for," etc. In consideration, the sellers were to receive for prepared sizes sixty-five per cent. of the general average price prevailing at tide-water points at or near New York as computed from month to month, this average price to be settled by an expert agreed upon by the parties.

It is further averred that this price was such as to enable the independent operator entering into one of these contracts to realize upon his coal from fifteen to fifty cents more than he could when shipping on his own account after paying the established rates of transportation, waste and cost of selling, in competition with the coal of the defendants. That the difference was the price paid for the privilege of controlling the sale of the independent

output, "so as to prevent it from selling in competition with the output of their own mines."

It is then further alleged that the result of this plan, "as was intended, was to draw, if not to force, the great body of independent operators into making the aforesaid contracts, thereby enabling the defendants to control absolutely, and until the mines are exhausted, the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several States, particularly in the great tide-water markets."

It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that by concerted action between the defendants the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other States.

It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot

would be unlawful. Thus in *Swift & Company* v. *United States*, 196 U. S. 375, 396, where a plan or scheme consisting in many parts or elements was averred to constitute a combination forbidden by the act of July 2, 1890, it was said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

That the plan was calculated to accomplish the design averred, in the present case, seems plain enough. The anthracite field was very limited. The means for transportation from the mines to seaboard shipping points were in the hands of the defendant carriers. They, together with their subsidiary companies, controlled about ninety per cent. of the coal deposit and about seventy-five per cent. of the annual output. If the remaining output, that of the independent operators along their several lines, could be controlled as to production and sale at tide-water points, there would inevitably result such a dominating control of a necessity of life as to bring the scheme or combination within the condemnation of the statute.

That these sixty-five per cent. contracts were the result of an agreement through protracted conferences between the independent operators, acting through an authorized committee, and officials of the carrier defendants, who were likewise officials of the coal companies subsidiary to the railroad companies, is plainly established. That they were designed by the defendants

as a means of controlling the sale of the independent output in the market at tide-water points, thereby preventing competition with their own coal and as a plan for removing the great tonnage controlled by the independents from being used as an inducement for the entry of competing carriers into the district, is a plain deduction.

Some of the facts which lead to this conclusion will be referred to as briefly as the great importance of the case will permit:

That for a long time many of the independent operators had been selling their output to their great rivals, the defendant carriers and their several coal companies, is true. By means of such sales and deliveries at their own breakers, the sellers avoided freight, waste and expense of sales through agents, etc. The price they would thereby realize was fixed, and they were not dependent upon a fluctuating market. So long, therefore, as they could sell to their rivals at their breakers to better advantage than they could ship and sell on their own account, the method appealed to them. But, obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. If the rate of freight to tide-water was onerous and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants. Therefore, it was that the higher the freight rate, the greater the inducement to sell to the carrier companies. That the conditions were not accepted by the independent producers as satisfactory, is evident. The majority at all times stood out, and those making such agreements as well as those refusing to do so, maintained

an agitation for better freight rates and better prices for those who preferred to sell at their breakers. For many years before this proceeding they maintained an organization called "The Anthracite Coal Operators' Association," and through that body endeavored to improve their situation.

The series of contracts here involved were all made since 1900, and are therefore subsequent to the combination through the Temple Iron Company, already considered. The charge is that since that combination the defendants further combined through these contracts. Prior to 1900, we find no evidence of any combination or agreement for the procurement of contracts of sale with independent operators. Upon the contrary there is much to indicate that there was more or less competition for coal accessible to more than one of the buying defendants. The effect of competition is shown by the gradual rise in the price the great companies were willing to pay. In the earliest stages of the business the buying price seems to have been fixed with some relation to the varying wage scale of miners. This gave way to an agreed percentage of the current price at tide-water. Thus the earlier contracts allowed the selling operator only forty per cent. of the tide-water price for prepared sizes. Through competition between the existing companies, and through that which resulted from the entry of new carrier lines with their subsidiary coal companies, the price was forced gradually up from forty to sixty per cent. of the tide-water price, and at this latter figure the price stood when the combination here averred came into existence.

We have mentioned the influence of the coming into the region of new coal-carrying railroads upon the per cent. of the tide-water price which the independent operators were able to obtain from the buying coal companies. This influence, as we shall see, was a large factor in bringing about the contracts now in question. The carriers

here defendant did not all obtain their footing in this anthracite field at the same time. Thus, when the New York, Susquehanna & Western was projected, it, through its coal company, offered to buy coal on fifty per cent. contracts. The price before that had been forty to forty-five per cent. The result was that the other companies came gradually up to the same price. This was late in the eighties, the exact date not being at hand. Again, it is said in the brief for the defendants, that:

"In the early 90's, the New York, Ontario & Western Railroad built a branch into the Wyoming region and sought tonnage. Mr. Sturgis was commissioned beforehand by the coal company of that railroad to offer 60% contracts on the understanding that, if he could secure a half million tons annually, the branch would be built. The branch railroad was built, and by its help large new acreages of coal lands were developed, tributary to the Ontario & Western Railroad."

As a consequence, says the same brief, "the other coal companies began to raise their rates to sixty per cent.," and by 1892 that had become the settled price.

The influence of competition, actual or threatened, was also illustrated in 1898, when the New York, Wyoming & Western was projected. A large number of coal contracts had expired or were about to expire, thus creating a great tonnage open to competition. Many of the operators in the Wyoming region of the coal field united their influence to procure the building of a competing line between the mines and New York harbor points. To this end a large tonnage was pledged to its coal-selling company, which offered to pay sixty-five per cent. of the tide-water price to such operators. How and why that project failed we have already shown in the section of this opinion devoted to the Temple Iron Company combination.

When that effort failed there arose a movement for a

new road from the mines to tide-water through the Pennsylvania Coal Company. That was one of the greatest of the independent companies, producing in 1899 about two million tons. It controlled a coal-gathering railroad called the Erie & Wyoming Valley Railroad, and proposed its extension to Lackawaxen, and to cause the construction from that point of a railroad line to the Hudson River. To this end it caused to be organized the Delaware Valley & Kingston Railroad. Of this project, Mr. Thomas, the president of the Erie Railroad Company, said: "They were threatening and had started to build a competing road to the Hudson River." The independent operators, in an association maintained by them for their mutual protection, hailed this scheme with joy. At a meeting of the association on November 22, 1899, the following minute was made:

"Mr. E. L. Fuller, chairman of the executive committee, on being called upon, told of the efforts which have been made to induce the various anthracite railroads to offer more satisfactory terms for the purchase of the operators' coal, and of the absolute failure of these efforts to bring about any definite result. He then reported the organization of the Delaware Valley & Kingston Railroad, backed by the Pennsylvania Coal Company, and the proffer of this latter company to purchase coal from operators in the Wyoming and Lehigh region, paying 65 per cent. of the tide-water price for chestnut and larger; 50 per cent. for pea coal, and a flat 85 per cent. freight rate on buckwheat and smaller sizes. These contracts were to be for all of the coal in the ground, thus settling permanently the price which the operator would receive.

"After extended discussion as to the details of these contracts, and a comparison with the results obtained under the old contracts, the following resolution was offered and passed unanimously:

"'Whereas the Erie & Wyoming Valley Railroad Com-

pany has arranged to build a branch line from Hawley, Pa., to a point on the boundary line between New York and Pennsylvania at Lackawaxen, forming a connection with a railroad proposed to be constructed by the Delaware Valley and Kingston Railroad Company to tidewater, at Kingston, on the Hudson River;

"'And whereas the construction of the said railroads is approved and promoted by the Pennsylvania Coal Company, which has large interests in the anthracite coal region;

"'And whereas the independent operators and the general public are now largely at the mercy of the existing railroad companies, which charge unreasonable rates for their services, owing in part to the large amounts for which the said companies have been capitalized;

"'And whereas it would be highly advantageous to all the independent owners of coal properties throughout the entire anthracite region of Pennsylvania to have the railroad connection, now proposed, completed as speedily as possible;

"'And whereas it is equally desirable, in the interests of the people of the State of New York and the public in general, that such railroad connection shall be made (since it will necessarily result in a material reduction of the price paid for anthracite coal by consumers), now, therefore, it is

"'*Resolved*, I. That this association hereby expresses its hearty and unqualified approval of the proposed plan for the construction of the said railroads, and hereby pledges its constant support and active assistance in promoting the speedy construction and completion of the said railroads.

"'II. That a committee of three be appointed by the president, of which the president shall be a member, to take such steps as may be deemed advisable toward furthering the said plans and coöperating with the said com-

panies for the completion of the said railroads, and that a report of their proceedings be submitted to the next meeting of this association.'

"In the discussion which followed, it was the opinion of those present that, in view of the hearty assistance which had been accorded the operators by the Pennsylvania Coal Company, it was the duty of the members to give to this company all of the tonnage which they could deliver and not to permit any more advantageous offers which the older companies might make, to divert freight from a road which was constructed to give the operators a fair share in the selling price. A vote of thanks was accorded Mr. Fuller for his labor and great success in accomplishing a work which was for the advantage of every individual operator in the anthracite regions."

It is enough to say of this project that it was abandoned when, in 1901, the Erie Railroad acquired, without any concert of action between it and the other carrier defendants, the capital stock of the Pennsylvania Coal Company, which carried with it the capital stock of the Erie & Wyoming Valley Railroad and the Delaware & Kingston Railroad.

The persistent effort of the independents to bring into the field competing carrier and coal-producing companies was a menace to the monopoly of transportation from that field to tide-water which the defendants collectively possessed. The independent output was one-fourth of the annual supply. It was mainly sold at tide-water, where it came into active competition with the larger production of the defendants; but, as we have already seen, this enormous tonnage offered a great inducement to the organization of new carrier lines from the mines to the seaboard. The contracts theretofore made for the purchase of this output had been for short terms. The expiration of a considerable number had more than once been the occasion for new carrier projects backed by the

independent operators. To renew the contracts for short terms would but postpone the day of competition. The control in perpetuity of such a large proportion of the output as would prevent in the future effective competition in the selling markets of the coast, and at the same time remove inducement to the entry of other lines of carriers, was the obvious solution of the situation. The necessary control could only come about through concerted action. If one of the several independent groups of defendants, or two, or any less number than all, had sought to obtain control, it would have been resisted by those not included. Therefore, it is plain that if the coal of these operators was to be placed in such situation as that it could not affect the price of their own coal, nor longer constitute a mass of tonnage sufficient to invite the construction of new lines from the mines to the sea, it must be brought about through the concerted action of the defendants.

In 1900 there occurred the great strike of the coal miners. Settled by arbitration in the fall of that year, the miners obtained a ten per cent. increase in wages. Of course, this affected the railroad coal-producing companies and the independent coal companies alike. The great companies took the lead in the arbitration and accepted the result. The independent companies were compelled to follow this lead. The latter, as we have seen, had before the strike been particularly urgent in their efforts to secure better conditions from the railroads and their allied coal companies. This rebellious attitude is partially shown by the resolution of the Anthracite Coal Operators' Association of November 22, 1899, heretofore set out. When the strike settlement was made, there was some hesitation among the independent operators about posting notice of the advance in wages, and through committees they urged upon the defendants that such advance in wages justified a reduction in freight rates and a price of not less

than sixty-five per cent. for coal sold to the defendant companies. The committees reported back that they could not obtain "any definite promise," but there has been "an intimation" that something would be done to improve the present conditions. It was thereupon resolved that the advance scale should be posted, and that a committee should be appointed "to confer with the various carrier companies, relative to a new contract." At the same meeting a number of the operators present signed an agreement empowering the committee named "to adjust all differences with certain transportation companies," and agree upon a basis of contract which should definitely and for a period of years fix the commercial relations between the said operators and the transportation companies, "each of the parties agreeing to make a particular contract for himself with the proper transportation company." This agreement, after being signed by those present, was placed in the hands of Mr. McNulty to secure further signatures. These matters appear on the minutes of the individual operators of October 5th. There ensued a number of conferences between the representatives of the sellers and buyers. The result was that a form of contract and a price was mutually agreed upon, being the form of the sixty-five per cent. contracts, which were thereafter entered into as the short term agreements theretofore made expired. Thus the independents put in force the advance wage scale imposed by the strike arbitrators before any agreement whatever was made or promised by the defendants. This increased scale which the arbitration imposed having been accepted by the large companies, could not be successfully resisted by the independents. It only operated to make them more persistent in their demand for some improvement in the methods and prices theretofore prevailing.

That the defendant companies should offer such terms is not surprising. The contracts to be made would be not

only for the life of the mines being operated at the date of the sale, but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tide-water would be removed forever.

Upon this aspect of the case we find ourselves in agreement with Judge Buffington, who concluded a discussion of the evidence by saying (183 Fed. Rep. 474):

"By such perpetual contracts . . . these defendant railroads through their subsidiary coal companies severally made with other collieries these combiners withdrew, and still continue to withdraw, such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding then that they are in the words of the statute, 'contracts . . . in restraint of trade or commerce among the states,' I record my dissent to the action of the court in refusing to enjoin them."

The coal contracts acquired when this proceeding was begun aggregated nearly one-half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania and all of the contracts were made in that State and the coal was also there delivered to the buying defendants. That the defendants were free to sell again within Pennsylvania, or transport and sell beyond the State, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide-water, and the sales were made upon the basis of the average price at tide-water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the

general consuming markets of other States. "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Company* v. *United States*, 196 U. S. 375, 398; *Loewe* v. *Lawlor*, 208 U. S. 274. The purchase and delivery within the State was but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose. As was said by the Chief Justice, in *Loewe* v. *Lawlor*, (p. 301) cited above:

"Although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial."

The general view which this court took of the effect of these contracts upon interstate traffic in the coal of this region is indicated in *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 42. The concerted plan concerned the relations of these railroads to their interstate commerce and directly affected the transportation and sale and price of the coal in other States. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York harbor.

That per cent. of the average price at tide-water retained by the buyer was assumed to cover the freight, waste and cost of sale. There is evidence tending strongly to show that an independent accepting one of these con-

tracts realized slightly more than he could realize if he had shipped and sold on his own account. This advanced price, therefore, as charged in the bill, constituted a great inducement to draw the independents within the control of the defendants, and makes it highly probable that if not enjoined they will absorb the entire independent output.

The defendants insist that these contracts were but the outgrowth of conditions peculiar to the anthracite coal region and are not unreasonably in restraint of competition but mutually advantageous to buyer and seller.

That the act of Congress "does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose," was pointed out in the *Standard Oil Case*, 221 U. S. 1. In that case it was also said that "the words 'restraint of trade,' should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect." We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly suppress competition and restrain freedom of commerce among the States.

Before these contracts there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was after the contracts impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at least

remove illegal barriers resulting from illegal agreements which will make such competition impracticable.

Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, 394; *Swift & Co.* v. *United States*, 196 U. S. 375.

In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition and of a purpose to unduly restrain the freedom of production, transportation and sale of the article at tide-water markets.

The case falls well within not only the *Standard Oil* and *Tobacco Cases*, 221 U. S. 1, 106, but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: *Northern Securities Company* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *National Cotton Oil Company* v. *Texas*, 197 U. S. 115; *United States* v. *St. Louis Terminal Association*, 224 U. S. 383, and the recent case of *United States* v. *Union Pacific Railway*, *ante*, p. 61.

We are thus led to the conclusion that the defendants did combine for two distinct purposes,—first, by and through the instrumentality of the Temple Iron Company,

with the object of preventing the construction of an independent and competing line of railway into the anthracite region; and, second, by and through the instrumentality of the sixty-five per cent. contracts with the purpose and design of controlling the sale of the independent output at tide-water.

The acts and transactions which the bill avers to have been committed by some of the defendants in furtherance of the illegal plan and scheme of a general combination, are these:

a. The absorption in January, 1898, of the New York, Susquehanna & Western Railroad, through the purchase by the Erie Railroad of a large majority of its shares, whereby two lines of competing railroad came under one control and management.

b. The acquisition in 1901 of a controlling majority of the capital stock of the Central Railroad of New Jersey by the Reading Company, which then owned the entire capital stock of the Philadelphia & Reading Railway Company, and the Philadelphia & Reading Coal & Iron Company, "thereby uniting and bringing together under a common head and source of control the said Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, operating parallel and competitive lines of railroad, and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company," theretofore owned or controlled by the Central Railroad of New Jersey, thereby destroying competition between former competing carriers and coal-producing companies.

c. The absorption in 1899 by the Erie Railroad Company of the Pennsylvania Coal Company, thereby acquiring the stock control of the Erie & Wyoming Railroad Company and of the Delaware Valley & Kingston Railroad, thus defeating a projected construction of the last named railroad.

These were all minor combinations in which only some of the defendants participated. The accomplishment of these several subordinate transactions only completed one or another of the several groups of carriers and coal-producing companies, which several groups were thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing, one with another, prior to the general combination through the Temple Iron Company and the sixty-five per cent. contract scheme.

So far as this record shows not one of these transactions was the result of any general combination between all of the defendants and constituted no part of any such general combination. None of the defendants had any part or lot in bringing them about except the particular combining companies.

It is true that the bill asks injunctions against the continuance of each of these minor combinations. But if, as we conclude, they did not constitute any part of any general plan or combination entered into by all of the carrier companies, their separate consideration as independent violations of the act of Congress is not admissible under the general frame of this bill. To treat the bill as one seeking to apply the prohibition of the act of Congress to each one of these independent combinations would condemn the pleading as a plain misjoinder of parties and of causes of suit, and a plain confession of multifariousness. All of the defendants had a common interest in the defense of the Temple Iron Company combination, and that of the sixty-five per cent. contracts, because it was alleged that all had joined therein. But all of the defendants did not have a common interest in the defense of these three minor combinations, unless it appear that they were, as charged, "steps," or acts and agreements in furtherance of the general combination to which they were all parties. This we find not to be the fact. If, therefore, we shall

treat the bill as broad enough to involve combinations which were not steps or acts in furtherance of any general combination, we shall overrule the objection of multifariousness made below and here, for we shall then maintain a bill setting up three separate and distinct causes of action against the distinct groups of defendants, one having no interest in or connection with the other. The grounds of each suit would be different and the parties defending different. See the discussion and cases cited in Simpkins' Federal Equity Suit, pp. 290 *et seq.*

Having failed to show that these minor combinations were acts in furtherance of the general scheme, or the acts of the combiners in the two combinations condemned, we are asked to deal with them as separate illegal combinations by such of the defendants as participated. This the court below declined to do, and we in this find no error.

As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as independent combinations, between some but not all of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations.

The decree of the court below is affirmed as to the Temple Iron Company combination. It is reversed as to the sixty-five per cent. contracts, and the case will be remanded with direction to enter a decree cancelling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion.

MR. JUSTICE DAY, MR. JUSTICE HUGHES and MR. JUSTICE PITNEY did not participate in the consideration or decision of this case.

McLEAN, WIDOW OF NATHANIEL H. McLEAN, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 33. Argued November 6, 1912.—Decided December 23, 1912.

Under the act of Congress of February 24, 1905, 33 Stat. 806, c. 777, directing the accounting officers to settle and adjust all back pay and emoluments that would have been due to an officer had he remained in the army for a period that he was out of the army after an enforced resignation from that time until his reinstatement *held* that, under such a statute:

The duties of accounting officers are administrative and not judicial, and as to whatever rights arose under the act as to its construction, the Court of Claims had jurisdiction to determine.

In order to construe the statute and make the redress as complete as Congress intended, reports of the committees of both houses having the matter in charge may be referred to.

Public moneys are not appropriated as mere gifts and such an act will not be regarded as a simple gratuity.

The words "all back pay and emoluments" include forage, rations, and pay for servants to which the officer would have been entitled under the statutes had he remained in the army, and in adjusting under the statute those items should not have been excluded because the officer was not actually in service of the United States.

An act of Congress will not be construed as giving a right and taking it away at one and the same instant; nor will the conditions making it necessary be made a reason for defeating it.

The word "all" excludes the idea of limitation.

45 Ct. Cls. 95, reversed.

THE facts, which involve the amount due to a reinstated officer of the United States Army for back pay and emoluments under an act of Congress and the proper method of computing the same, are stated in the opinion.

Mr. Archibald King for appellant.

Mr. William W. Scott, with whom *Mr. Assistant Attorney*

General John Q. Thompson was on the brief, for the United States:

This court has repeatedly held that it will not go behind the findings of fact as made by the Court of Claims and will not consider the evidence upon which they were founded. 5 Wall. 419; 17 Wall. XVII; 93 U. S. 605; 111 U. S. 609. See also *Sisseton & Wahpeton Indians* v. *United States*, 208 U. S. 561, 566, citing *McClure* v. *United States*, 116 U. S. 145; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150; *Sac & Fox Indians* v. *United States*, 220 U. S. 481, distinguishing *United States* v. *Old Settlers*, 148 U. S. 427.

The act of February 24, 1905, constituted the accounting officers and not the courts the tribunal to settle the accounts.

In order to ascertain if there was anything due under said act the accounting officers were required to decide as a question of fact whether or not McLean "actually kept in service" any servants and, if so, how many.

Still another question of fact to be determined by the accounting officers was whether or not McLean actually kept any horses during said period at the place where he was on duty.

To decide these two questions of fact it was necessary for the accounting officers to pass upon the weight and competency of evidence.

The finding and conclusion reached by the accounting officers of the Treasury is final and conclusive, and the Court of Claims was without authority to review it. *United States* v. *California & Oregon Land Company*, 148 U. S. 31, 43; *Foley* v. *Harrison*, 15 How. 433, 446; *Steele* v. *Smelting Co.*, 106 U. S. 447, 451; *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 229; *Marshall's Case*, 21 Ct. Cls. 307; *Plummer's Case*, 24 Ct. Cls. 517; *Parish* v. *MacVeagh*, 214 U. S. 124.

If the act required only an administrative action on the

part of the accounting officers, the requirements of said act were complied with by them when payment was made of the pay of a major and personal subsistence.

If the act required discretionary action by the accounting officers of the Treasury, then the act made those officers a special tribunal, and their findings and payments made thereunder are conclusive and were not properly reviewable by the Court of Claims.

An officer resigning is not entitled to commutation of allowances. *United States* v. *Sweet*, 189 U. S. 471; *Jones* v. *United States*, 4 Ct. Cls. 197.

McLean was out of the service and with him it was impossible to make the certificate required to entitle him, much less his widow, to servants' pay and allowances. *Kilburn* v. *United States*, 15 Ct. Cls. 41, 46, differs from the present case, as Kilburn was unjustly or inadvertently dismissed the service, while McLean voluntarily separated himself from the service by resigning.

The findings do not show that McLean had servants and horses actually in the service.

The act of July 15, 1870, abolished all emoluments and allowances for forage and servants. 18 Stat. 320, § 24.

The law authorizing commutation of forage provided "that neither forage nor money shall be drawn by officers, but for horses actually kept by them in service." 3 Stat. 299; *United States* v. *Phisterer*, 94 U. S. 219; *United States* v. *Lippitt*, 100 U. S. 663, 670.

As to what are pay and emoluments, see *Sherburne's Case*, 16 Ct. Cls. 491, 496; *Wilson's Case*, 44 Ct. Cls. 428; *Odell's Case*, 38 Ct. Cls. 194.

Mr. Justice McKenna delivered the opinion of the court.

The question in the case is the extent of relief to which appellant is entitled under the following act of Congress, passed February 24, 1905:

"That the proper accounting officers be, and they are hereby directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant-Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated." 33 Stat. 806, c. 777.

McLean entered the United States Military Academy July 1, 1844, graduated therefrom and was appointed brevet second lieutenant in the army July 1, 1848, and served until the year 1864, when, having attained the rank of major and assistant adjutant general, he resigned, his resignation being accepted July 23, 1864. By act of March 3, 1875, 18 Stat. c. 187, p. 515, Congress authorized the President to appoint Major McLean to fill the first vacancy which might occur in the lowest grade of the adjutant general's department, "or, if he shall deem it best, to reinstate and retire him with the rank to which he would have attained in service at the date of the passage of this act." Under this authority Major McLean was reinstated and placed on the retired list as lieutenant colonel and assistant adjutant general, to rank from March 3, 1875. He continued in that rank until his death, which occurred June 28, 1884. From the date of the acceptance of his resignation, July 23, 1864, to the date of his reinstatement, March 3, 1875, he received no pay. This interval is provided for by the act of February 24, 1905, *supra.*

Under that act appellant presented a claim to the Auditor of the War Department, who allowed her pay and personal subsistence which would have been due her husband from the date of the acceptance of his resigna-

tion, July 23, 1864, to the date of his reinstatement, March 3, 1875, but disallowed a claim made by her for forage and servants' pay. The disallowance was confirmed by the Comptroller of the Treasury. This action was then brought in the Court of Claims. The court sustained the accounting officers as to forage and servants' pay, saying: "As an officer of his grade, plaintiff's intestate was entitled to two servants and forage for two horses had he remained in the military service. But the officer resigned, and such voluntary retirement from the service operated to deprive the officer by his own act of the opportunity to draw the allowance incident to the keeping of two servants and two horses." As to those two items the petition was dismissed. The court, however, decided that the claim for a ration is analogous to longevity pay and is on a different basis. The court said: "The officer, by the act of reinstatement, became entitled to compensation for and during the whole period of service, with the consequent ration increase incident to the services supposed to have been rendered for the time set forth in the petition. It is all, strictly speaking, 'pay proper' . . . This entitled the plaintiff to $682.75 in addition to the amount allowed by the accounting officers." Judgment was ordered and entered for that sum. 45 Ct. Cls. 95.

The jurisdiction of the Court of Claims to entertain the action was attacked in that court and is attacked here, the contention being that the act for the relief of appellant "constituted the accounting officers and not the courts the tribunal to settle the accounts." The court ruled against the contention, and rightly. It is not necessary to repeat its reasoning. The duties of the accounting officers were, as the court said, administrative, not judicial, and as the rights of appellant arose under an act of Congress the court had jurisdiction to determine them. *Medbury* v. *United States*, 173 U. S. 492.

Upon the merits certain acts of Congress besides that

for the relief of appellant are pertinent to be considered.

The act of July 17, 1862, 12 Stat. 594, c. 200, provides that majors shall be entitled to draw forage in kind for two horses and that in case forage in kind cannot be furnished by the proper department, officers may commute the same according to existing regulations. The act of April 24, 1816, § 12, 3 Stat. 297, c. 69, fixes the money value of forage at eight dollars per month for each horse when the same shall be commuted. But it is provided "that neither forage, nor money shall be drawn by officers, but for horses actually kept by them in service." The act of July 15, 1870, 16 Stat. 315, 320, c. 294, provides a new pay system for officers of the army, abolishing commuted forage and all such emoluments, by including them in pay proper.

Under the acts of March 30, 1814, §§ 9 and 10, 3 Stat. 114, c. 37; April 24, 1816, *supra*, and March 3, 1865, 13 Stat. 487, c. 79, and the Army Regulations in force from July 24, 1864, to July 14, 1870, there would have been due and payable to McLean, as an emolument in the grade of major, servants' pay and allowance for as many servants, not exceeding two, as were actually kept by him at his expense, at the rate of pay, ration and clothing allowance of a private soldier in the army for each servant so kept. By other acts of Congress commissioned officers other than general officers were entitled to receive one additional ration per diem for every five years of service, which had a commuted value at various sums until July 28, 1867, when it became thirty cents.

The Court of Claims found that from the date of the acceptance of McLean's resignation until September 23, 1864, he had one servant in his employment on the trip from Portland, Oregon, the place of his resignation, to his home in Cincinnati, Ohio—time two months. From the latter date to July 14, 1870, inclusive, he had servants in

his private employ, but how many is not satisfactorily established from the evidence. The servants were not enlisted men of or connected with the army. From the dates before mentioned he owned two horses, one used occasionally for a saddle horse, but they were generally used for his private carriage.

The question, then, is whether under the facts as found and the acts of Congress above stated in regard to officers' pay and allowance and the act for the relief of appellant, she is entitled to the commuted value of forage which would have been due and payable to her husband as a major from September 24, 1864, to July 14, 1870, and servants' pay. Urging the negative of the question and in support of the decision of the Court of Claims, it is contended that for the period specified McLean was not in the service of the United States and therefore did not have and could not have had any horses or servants "actually kept in service" by him as required by the act of April 24, 1816, *supra*. To the contention appellant opposes the purpose and words of the statute. She asserts that the prompting of the act was to repair an injustice done to Major McLean, and, to support the assertion, she refers to the report of the committee of the House of Representatives and that of the Senate, Fifty-third Congress. The reference is justified (*Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 333; *Northern Pacific Co.* v. *Washington*, 222 U. S. 370, 380) and gives support to the contention that the circumstances which preceded and provoked Major McLean's resignation appealed to Congress, and to redress its consequences Congress authorized his reinstatement, and, to make it complete, passed the act of February 24, 1905.

It certainly may be assumed that the act was not a simple gratuity. Public moneys are not appropriated as mere gifts. They are appropriated in recognition and reward of merit or in recompense for service, or, as it may

be inferred in the present case, reparation for injustice done. Keeping this in mind, the extent of the relief granted to appellant may be determined. Indeed, the plain directness of the act of Congress leaves nothing to interpretation. The proper accounting officers are directed to settle and account to her "all back pay and emoluments that would have been due and payable" to her husband as a major of the United States Army from July 23, 1864, to March 3, 1875. The words are all-comprehensive. They embrace all the compensation, perquisites and dues to which he was entitled as an officer. About back pay there is no question. The accounting officers allowed the pay of the designated rank and the personal subsistence which would have been due and payable to the deceased officer. The Court of Claims extended the definition of "pay" somewhat farther and included in it "ration increase incident to the service supposed to have been rendered for the time set forth in the petition." And, necessarily, for "service supposed" is the attribution of the act of Congress, not service rendered or possible to be rendered. But the supposition which is made efficient to give pay is sought to be halted at "emoluments," and the contention is advanced, as we have seen, that they must be considered as including only allowances or reimbursement for expenses actually incurred while in the service of the United States. The contention is not justified. The act, in order to make its relief complete, treats the officer and compensates him as though he had been in actual service from the date of his retirement to the date of his reinstatement. It is in this aspect that we must apply it. He is to be regarded for the time stated to have been in the Army of the United States, entitled to pay, entitled to emoluments, the latter as much as the former. The words of the statute make no distinction between them. Whatever is directed to be settled—pay or emoluments—is for compensation, not for actual service, but for at-

tributed service. This, we repeat, is the scheme of the statute and the test of its application. It is difficult to deal with a distinction between pay and emoluments. Both are rewards or compensation, the one no more than the other, for "service supposed." To say that one is certain and the other contingent has no meaning in the situation of Major McLean. He could not have performed the condition upon which either depended under the then existing law, and to distinguish between them notwithstanding is to enter a maze of irrelevant considerations. The enactment is, and we return to it as its own best interpreter, "that the proper accounting officers be, and they are hereby, directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant-Colonel Nathaniel H. McLean, all back *pay* and *emoluments* that would have been due and payable" to him "as major from July 23, 1864, to the date of his reinstatement, March 3, 1875. . . ." It is manifest that the supposition of service by the officer is attributed to both pay and emoluments. Under that supposition what essential difference is there between them? Pay and emoluments are but expressions of value used to give complete recompense to a deserving officer. Their association was deliberate; emoluments were additive to pay, and the direction as to them is as substantive as the direction as to it, and qualified by no other condition. Of what consequence, then, how they may be defined? They may be called "indirect or contingent remuneration," as they have been called; it may be said, as it has been said, that "they are sometimes in the nature of compensation and sometimes in the nature of reimbursement." But, however they be defined, Congress has granted them, and advisedly, knowing Major McLean's situation, knowing that they included allowance for servants and forage for horses, and knowing that while the servants and horses could not have been used by him in the service of the United States, they could

have been used, as they were used, and ascribed to that service. With this knowledge and with full understanding of what it was doing, Congress directed the accounting officers "to settle and adjust all back pay and emoluments." To decide otherwise is to say that Congress gave a right and took it away at one and the same instant, or, in some confusion of mind, intended to withhold it by using the aptest word to confer it.

The Government realizes the situation and attempts to explain or escape it. Its argument is somewhat peculiar. Its contention is that Major McLean, by his resignation, "must be considered as having intentionally [and the word is especially emphasized] placed himself without the service of the United States," and so, having voluntarily separated himself from the service, he was, and his widow is, unable to furnish the certificate required by statute to secure commutation for forage and servants' pay. Of course, he was out of the Army. If he had not been out of the Army there would have been no necessity for the act of Congress, and we cannot consider the condition which made the act necessary a reason for defeating it. The plain motive of the act exposes the weakness of the contention. If we keep in mind the purpose which impelled the enactment in behalf of Mrs. McLean we will have no difficulty in deciding how adequate its language is to accomplish it. "All back . . . emoluments" are the words used. "All" excludes the idea of limitation, and the word "emoluments" is the most adequate that could have been used. It especially expresses the perquisites of an office, and its use in conjunction with "pay" makes the restitution of the statute complete.

Judgment dismissing the petition as to forage and servants' pay reversed and the case remanded for further proceedings in accordance with this opinion.

WOOD, TRUSTEE IN BANKRUPTCY OF LECHE, *v.* A. WILBERT'S SONS SHINGLE AND LUMBER COMPANY AND WILBERT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 61. Argued December 5, 1912.—Decided December 23, 1912.

Where defendant files a formal appearance and simultaneously files an exception to the jurisdiction, the two papers should be considered together, and as such cannot be regarded as a consent to submit to the jurisdiction in a case where consent is necessary.

An objection that the exception and demurrer did not comply with Rule 31 owing to failure to make affidavit that they were not interposed for delay, if not raised in the court below or assigned as error, cannot be raised in this court.

The District Court has not jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the Bankruptcy Act as amended by the act of February 5, 1903, c. 487, § 8, 32 Stat. 797.

This court will assume that all the amendments to different parts of the same act of Congress passed at the same time were intended not to conflict but to be in accord as provisions for different situations.

THE facts, which involve the construction of §§ 23a and 23b of the Bankruptcy Act and the jurisdiction of the District Court of the United States thereunder, are stated in the opinion.

Mr. Benjamin Rice Forman, with whom *Mr. William Lee Hughes* was on the brief, for appellant.

Mr. Clarence Samuel Herbert, with whom *Mr. Walter Guion* was on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The case is here on a question of jurisdiction. Appellant brought suit in the District Court November 3, 1909, as trustee of one Edward Douglas Leche to set aside a sale of lands made by Leche to appellee, A. Wilbert's Sons Shingle and Lumber Company, herein called the shingle and lumber company, and to account for the rents thereof or the proceeds of the land that may have been sold, and to otherwise render a full account to appellant of the transactions with Leche, individually or otherwise.

Appellees on the third of December, 1909, filed an exception to the jurisdiction of the court, alleging as cause thereof that they were domiciled in the Parish of Iberville and that the court was without jurisdiction over their persons and over the subject-matter of the litigation. A demurrer to like effect was filed on the tenth of December and stated that it was "by way of amendment to the form of demurrer filed herein on December 3, 1909."

The demurrer was sustained. The court said: "From the oral arguments and brief filed it is evident the trustee brings his action under the provisions of section 70, subdivision e, of the bankruptcy act, and the bill does not disclose any cause of action under either section 60, subdivision b, or section 67, subdivision e, and therefore, by virtue of the authority of *Hull* v. *Burr*, 153 Federal, 945, this court has no jurisdiction to entertain the suit except by the consent of the defendants." The bill was dismissed without prejudice to complainant.

The certificate of the judge recites that the sole question decided by him and certified to this court was whether or not the District Court "has jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the Bankrupt Act as amended in 1903."

There are some minor questions presented by the brief

of counsel of which we must first dispose. It was contended in the court below that the appellees, by entering a formal appearance, waived their right to object to the jurisdiction. But they at the same time filed an exception to the jurisdiction, and the District Court decided that the two papers should be considered together, and, so considering them, held that they could not be regarded as a consent on the part of the defendants to submit themselves to the jurisdiction of the court. The ruling is not assigned as error. It is urged further that neither the exception nor the demurrer complied with the thirty-first equity rule, in that the appellees did not make affidavit that they were not interposed for delay. It is sufficient to answer that the objection was not made in the court below and is not assigned as error on this appeal. We therefore pass to the consideration of the question certified.

The bill charges with much circumstantial detail, which it is not possible to briefly state or analyze, that the lumber and shingle company and its president, Frederic Wilbert, had entered into a conspiracy with the bankrupt and certain other parties by which, on June 6, 1906, the shingle and lumber company acquired title to certain plantations belonging to the bankrupt situated in the Parish of Iberville, Louisiana. The purpose of the conspiracy, it is charged, was to conceal from his creditors the bankrupt's assets and property and to protect them from the pursuit of his creditors, with the understanding that when he got his discharge in bankruptcy the property was to be transferred to him. It was prayed that the sale be set aside and the defendants be decreed to convey the lands to complainant in trust for the creditors of the bankrupt. Without further detail of the bill we shall assume for the purpose of the consideration of the question that it states facts sufficient to constitute a ground of relief if the court have jurisdiction.

The Bankruptcy Act is very comprehensive of the whole subject of bankruptcy. It creates courts of bankruptcy and is full in its provisions for the collection and preservation of the estate of the bankrupt through trustees appointed by creditors who are given power to bring suits to recover the property of the bankrupt which has been conveyed by him in fraud of his creditors or to give a preference to any of them; the purpose of the act being to secure an equality of distribution of the assets of the bankrupt among his creditors.

Section 23a gives jurisdiction of such suits to the Circuit Courts of the United States which involve controversies at law or in equity, as distinguished from proceedings in bankruptcy, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts" and the "adverse claimants." By subdivision b of § 23 it is provided that suits by the trustee shall only be brought or prosecuted where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant; "*except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*" The words in italics were added as amendment by act of February 5, 1903, c. 487, § 8, 32 Stat. 797. Upon them the question in the case turns. Prior to the amendment, and passing on § 23 as originally enacted, this court decided in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, that that section controlled and limited the jurisdiction of all courts over suits brought by trustees to collect debts due from third parties, or to set aside transfers of property to third parties alleged to be fraudulent against creditors, and that the District Courts of the United States could, by the proposed defendant's consent, but not otherwise, entertain jurisdiction of such suits. *Harris, Trustee,* v. *First National Bank of Mt. Pleasant*, 216 U. S. 382.

What, then, is the effect of the amendment? Section 60 defines what shall constitute a preference, with provisions for preventing or defeating them. Section 67 is concerned with liens, their extent, limitation and regulation. By subdivision b of § 60 it is provided that a conveyance of property by the bankrupt within four months before the filing of a petition in bankruptcy, or after the filing or before adjudication, for the purpose of giving preference to a creditor, shall be voidable by the trustee, and he may recover the property or its value from the creditor. Subdivision e of § 67 relates to conveyances made by the bankrupt within four months prior to filing the petition with the intention and purpose to hinder, delay or defraud his creditors. It is provided that such conveyance shall be null and void except as to purchasers in good faith and for a present fair consideration. The property so conveyed is declared to be part of the assets of the bankrupt's estate, and it is made the duty of the trustee to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. It is also provided that conveyances and transfers void as against creditors by the laws of the State, Territory or District in which the property is situated shall be deemed null and void against the creditors of the bankrupt and to be recovered by the trustee. By an amendment of 1903 (32 Stat. 800) it was provided that for the purpose of such recovery any court of bankruptcy and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction. The present suit does not fall within either of the sections or either of the subdivisions. The conveyance sought to be set aside was not given as a preference within the meaning of the law, nor was it, assuming it to have been fraudulent, made within four months of the filing of the petition in bankruptcy. The same limitation of time would apply even if the transfer of the property or any of the transactions connected with

it might be regarded in some of their aspects as giving a preference, as counsel suggest that they might be so regarded.

Subdivision e of § 70 is invoked as sustaining the jurisdiction of the District Court. That subdivision provides that the trustee may avoid any transfer made by the bankrupt of his property which any creditor might have avoided and may recover it unless the purchaser was a *bona fide* holder for value prior to the date of adjudication. This was the provision of the section as originally enacted. In 1903 these words were added: "For the purpose of such recovery, any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 32 Stat. 800. The language of the amendment seems to have no limitation except that the transfer must be one which any creditor could avoid, and, giving it such generality, the question occurs, can it be reconciled with § 23, subdivisions a and b? The amendment was a part of the same act and passed at the same time that the amendment to subdivision b of § 23 was, and we must assume that they were intended not to conflict but to be in accord as provisions for different situations. In other words, that it was the intention that each should have its proper application distinct from and harmonious with that of the other. Such application is observed by distinguishing between jurisdiction over the subject-matter and jurisdiction over the person, as pointed out by the Circuit Court of Appeals for the Fifth Circuit in *Hull* v. *Burr*, *supra*, approving and following *Gregory* v. *Atkinson*, 127 Fed. Rep. 183. In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of § 23 exists the consent of the defendant determines the court, except when the suit is "for the recovery of property

under section sixty, subdivision b, and section sixty-seven, subdivision e." These special exceptions exclude any other. And this is the view of the respective sections and their relation expressed in *Skewis* v. *Barthell*, 152 Fed. Rep. 534; *Palmer* v. *Roginsky*, 175 Fed. Rep. 883; *Parker* v. *Sherman*, 195 Fed. Rep. 648. *Contra: Hurley* v. *Devlin*, 149 Fed. Rep. 268.

Judgment affirmed.

DARNELL, EXECUTOR, *v.* STATE OF INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 78. Argued December 9, 1912.—Decided December 23, 1912.

The statutes of Indiana taxing all shares in foreign corporations except national banks owned by inhabitants of the State, and all shares in domestic corporations the property whereof is not exempt or taxable to the corporation itself, are not unconstitutional as contrary to the commerce clause of the Federal Constitution.

Quære, whether such statutes deny equal protection of the law by discriminating against stock in corporations of other States, especially as to those having property taxed within the State.

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection by such discrimination. *Hatch* v. *Reardon*, 204 U. S. 152, followed, and *Spraigue* v. *Thompson*, 118 U. S. 90, distinguished.

A State may tax the property of domestic corporations and the stock of foreign ones in similar cases. *Kidd* v. *Alabama*, 188 U. S. 730.

174 Indiana, 143, affirmed.

THE facts, which involve the constitutionality under the commerce clause of certain sections of the tax statutes of Indiana, are stated in the opinion.

Mr. Joseph F. Cowern, with whom *Mr. Merrill Moores* was on the brief, for plaintiffs in error:

The taxing statutes of Indiana, as construed by the courts of that State, violate the commerce clause of the Federal Constitution.

Shares of stock in a corporation are property. The owner of such shares owns and holds them as property separate and distinct from the capital stock and tangible property of the corporation. *Seward* v. *Rising Sun*, 79 Indiana, 351; *Darnell* v. *State* (Ind.), 90 N. E. Rep. 769; *Hasley* v. *Ensley*, 40 Ind. App. 598; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Farrington* v. *Tennessee*, 95 U. S. 679, 687.

As such shares have a value independent of the party owning them and are transported, held, bought, sold and taxed like other property, they are subjects of interstate commerce. Cases *supra* and *Paul* v. *Virginia*, 8 Wall. 168; *People* v. *Reardon*, 184 N. Y. 431; aff'd 204 U. S. 152; *Champion* v. *Ames*, 188 U. S. 321; *International Text Book Co.* v. *Pigg*, 217 U. S. 91.

When the statute of a State, as construed by the courts of that State, places a greater or more onerous burden upon property coming from a foreign State than is imposed upon like property of domestic origin, it is void, in so far as it discriminates, because in conflict with the commerce clause of the Constitution of the United States. *Darnell* v. *Memphis*, 208 U. S. 113; *Webber* v. *Virginia*, 103 U. S. 344; *Guy* v. *Baltimore*, 100 U. S. 434; *Walling* v. *Michigan*, 116 U. S. 446, 691.

The protection afforded by the commerce clause of the Constitution is not withdrawn or suspended after the property of foreign origin has acquired a permanent situs in the State and is commingled with and merged into the general mass of property therein. It continues "until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. *Welton* v. *Missouri*, 91 U. S. 275; *Darnell* v. *Memphis*, 208 U. S. 113.

The powers granted to the Federal Government and the corresponding limitation of the powers of the various States are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted. They keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. *Pensacola Co.* v. *West. Un. Tel. Co.*, 96 U. S. 1.

The commerce clause was made a part of the Constitution to insure, as nearly as was consistent with the reserved police powers of the States, absolute freedom of commercial intercourse within the boundaries of the United States. Under it the States are powerless to avail themselves of the protective principle or theory, directly or indirectly. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Guy* v. *Baltimore*, 100 U. S. 434; *Cook* v. *Marshall County*, 196 U. S. 261; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *Brown* v. *Houston*, 114 U. S. 622.

As the taxing statutes of Indiana as construed by her courts require all shares of stock in foreign corporations to be listed for taxation, while exempting from taxation like shares of stock in domestic corporations, they violate the commerce clause of the Constitution of the United States. See cases *supra*.

The Supreme Court of Indiana has practically admitted that the taxing statutes of that State were so framed as to call into play the protective theory. *Cook* v. *Board* (Ind.), 92 N. E. Rep. 876; *Hasley* v. *Ensley*, 40 Ind. App. 598.

The mere fact that when a domestic corporation goes into another State and establishes an industry the law requires the stockholders in such corporation to list their stock for taxation, does not disprove the charge of discrimination.

The taxing statutes of Indiana, as construed by the courts of that State, violate the Fourteenth Amendment.

While the equal protection clause of the Constitution permits classification for purposes of taxation, it forbids an arbitrary classification—a classification without substantial basis. Like property under like circumstances and conditions must be treated alike, both in the privileges conferred and the liabilities imposed. Where an act of the legislature discriminates, it is void to that extent. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Home Ins. Co.* v. *New York*, 134 U. S. 594. *Kidd* v. *Alabama*, 188 U. S. 730, and *Wright* v. *Louisville &c. Ry. Co.*, 195 U. S. 219, distinguished. In those cases stock in foreign corporations was not required to be listed for taxation if the foreign corporation was doing business and was taxed in the State whose statute was attacked, and it appears that in Indiana the manifest intent and purpose of the act is the development of home industries, not by legitimate inducements, but by discrimination carried so far as to even penalize the owners of stock in domestic corporations when such corporations go out of the State to do business.

Mr. Morton Sevier Hawkins, with whom *Mr. Thomas M. Honan, Attorney General of Indiana, Mr. James E. McCullough, Mr. Edward B. Raub* and *Mr. Martin M. Hugg* were on the brief, for defendant in error:

The statutes of Indiana taxing shares of stock in a foreign corporation held by a resident of Indiana do not violate the commerce clause of the Constitution.

A State has jurisdiction of all persons and things which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in use by the United States, and such State may tax, as part of their general estate attached to their persons, its residents for personal property owned by them but situated within

another State, even though the latter State also taxes such property. *Coe* v. *Errol*, 116 U. S. 517, 524; *Bonaparte* v. *Tax Court*, 104 U. S. 592.

In cases of intangible personal property the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that such property may be taxed at the domicile of the owner as the real situs of the property. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 205.

A tax in one State is no tax in another. *Wright* v. *L. & N. R. R. Co.*, 195 U. S. 219, 222; *Kidd* v. *Alabama*, 188 U. S. 730, 733.

In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. *Tennessee* v. *Whitworth*, 117 U. S. 129, 136; *New Orleans* v. *Houston*, 119 U. S. 265, 277; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *National Bank* v. *Owensboro*, 173 U. S. 644, 682.

The capital stock of a corporation is separable from the property of the corporation and the stockholders may be taxed upon their stock as for any other property they may own. *Gordon* v. *Appeal Tax Court*, 3 How. 133, 150; *Sturges* v. *Carter*, 114 U. S. 511, 521.

Shares of stock in a corporation follow the domicile of the owner like other personal property. 1 Cooley on Taxation (3d ed.), 86; 2 Cook on Corporations, § 565; *San Francisco* v. *Fry*, 67 California, 470; *Hart* v. *Smith*, 159 Indiana, 182, 193; *Greenleaf* v. *Board*, 184 Illinois, 226, and see *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499.

Bonds secured by mortgage held by a non-resident of the State in which the mortgaged property is situate are personal property and follow the domicile of the owners. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 323.

A tax on the property of a corporation is not a tax upon

its capital stock. *Van Allen* v. *The Assessors*, 3 Wall. 573, 583.

The owner of shares of stock in a corporation may dispose of them at his pleasure and in so doing works no change or modification in the title of the corporate property. *Judy* v. *Beckwith* (Iowa), 114 N. W. Rep. 565; *Bradley* v. *Bauder*, 36 Oh. St. 28.

The taxation by one State of shares of stock in a corporation of another State owned by a resident of the former State is a matter of policy for the legislature to determine in the absence of constitutional prohibition. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499; *Bacon* v. *Board &c.*, 126 Michigan, 22–26; *Greenleaf* v. *Board*, 184 Illinois, 226.

Indiana taxed the shares because they were owned by one of its residents and within its jurisdiction, not because they were employed in interstate commerce. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25.

The owner of the stocks taxed was not engaged in commerce between the States; his shares of stock were not in transit between or through any of the States; he had not gone into Indiana to sell his shares; and therefore the shares were not interstate commerce. *Hatch* v. *Reardon*, 204 U. S. 152; *New York* v. *Roberts*, 171 U. S. 658, 664.

Deposits and debts in one State owing to a resident of another State which are delayed within the jurisdiction of the former State an indefinite time are not *in transitu* so as to withdraw them from the taxing power of such State. *Blackstone* v. *Miller*, 188 U. S. 189, 203; *Nathan* v. *Louisiana*, 8 How. 73, 80; *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577, 589; *Brown* v. *Houston*, 114 U. S. 622, 633.

It is not a violation of the interstate commerce clause of the Constitution for a State to tax her resident citizens for debts held by them against non-residents. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499; *Am. Steel Co.* v. *Speed*, 192 U. S. 500, 521.

The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine when the article or product passes from the control of the State and belongs to commerce. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13.

The taxing statutes of Indiana did not deny the owner of these stocks the equal protection of its laws in contravention of the Fourteenth Amendment.

The rule of equality, in respect to the subject, only required the same means to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126.

Under a state law imposing a transfer tax upon personal property within the State belonging to a nonresident at the time of his death, such transfer tax may be levied upon debts and deposits owing to such decedent by citizens of that State, and such transfer tax does not deprive the executrix and legatees of such decedent of any of the privileges and immunities of the citizens of that State. *Blackstone* v. *Miller*, 188 U. S. 189–207.

The taxation by one State of shares of stock owned by a resident in a corporation of another State, when the property of the corporation is taxed in the State in which it is incorporated and does business, is not double taxation. *Sturges* v. *Carter*, 114 U. S. 511–521; *New Orleans* v. *Houston*, 119 U. S. 265, 277; *S. C.*, 63 California, 470, 471; *Porter* v. *Rockford &c. R. Co.*, 76 Illinois, 561, 566; *Greenleaf* v. *Board*, 184 Illinois, 226; *Thrall* v. *Guiney*, 141 Michigan, 392, 396; *Judy* v. *Beckwith*, 114 N. W. Rep. 565.

To be double taxation the same State must tax the corporation for its property and also tax its shares in the

hands of the owners. Cases *supra* and *Bradley* v. *Bauder*, 36 Oh. St. 28, 35.

A tax may lawfully be levied on the shares of a foreign corporation held and owned by a resident of the State which imposes the tax. Cases *supra* and *Kidd* v. *Alabama*, 188 U. S. 730; Cooley on Taxation (3d ed.), 86; *Bacon* v. *Board*, 126 Michigan, 22; *San Francisco* v. *Fry*, 63 California, 470; *Stanford* v. *San Francisco*, 131 California, 34; *Newark City Bank* v. *Assessor*, 30 N. J. L. 13, 20; *Wright* v. *Louis. & Nash. R. R. Co.*, 195 U. S. 219; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499; *Commonwealth* v. *Lowell*, 101 S. W. Rep. 970.

Whether a State shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 499; *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 356.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the State of Indiana for taxes on stock of a Tennessee corporation owned by the principal defendant. The Indiana statutes purport to tax all shares in foreign corporations except national banks owned by inhabitants of the State, and all shares in domestic corporations when the property of such corporations is not exempt or is not taxable to the corporation itself. If the value of the stock exceeds that of the tangible taxable property this excess also is taxed. Burns' Indiana Stats., 1908, §§ 10143, 10233, 10234. The declaration was demurred to on the ground that the statutes were contrary to the commerce clause, Art. I, § 8, and

the Fourteenth Amendment of the Constitution of the United States. Judgment was entered for the plaintiff, 174 Indiana, 143, and a writ of error was allowed.

The case is pretty nearly disposed of by *Kidd* v. *Alabama*, 188 U. S. 730, where the real matter of complaint, that the property of the corporation presumably is taxed in Tennessee, is answered. See also *Wright* v. *Louisville & Nashville R. R. Co.*, 195 U. S. 219, 222. But it is said that the former decision does not deal with the objection that the statutes work a discrimination against stock in corporations of other States contrary to principles often recognized. *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113. The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the State. But as to this it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground. *Smiley* v. *Kansas*, 196 U. S. 447, 457. *Hatch* v. *Reardon*, 204 U. S. 152, 160. If *Spraigue* v. *Thompson*, 118 U. S. 90, contains an intimation contrary to this rule, the decision was supported on other grounds, and the rule no longer is open to dispute. *Lee* v. *New Jersey*, 207 U. S. 67, 70. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 77, 78. *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, *ante*, p. 217.

The only difference of treatment disclosed by the record that concerns the defendants is that the State taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in *Kidd* v. *Alabama*, 188 U. S. 730, 732.

Judgment affirmed.

KEATLEY, AS RECEIVER OF AMERICAN GUARANTY COMPANY, *v.* FUREY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 84. Argued December 12, 1912.—Decided December 23, 1912.

In order to warrant a direct appeal to this court under § 5 of the Court of Appeals Act of 1891, the jurisdiction of the Federal court as such must be involved.

Whether title to the assets outside the State passed to a receiver of a corporation under an order of the court in the State of organization depends upon the law of that State, and a decision by a Federal court in another State having custody of assets through a receiver that no title passed and dismissing a petition of the first named receiver to intervene, does not involve the question of jurisdiction of the Federal court and warrant a direct appeal to this court.

In such a case the judge denying the petition to intervene is right in certifying that no question of jurisdiction exists.

In such a case the Federal court has jurisdiction over the intervention whether it has jurisdiction as a Federal court of the principal case or not; and until final decree in the principal case the question of jurisdiction is not open.

THE facts, which involve questions of jurisdiction of the Federal court, are stated in the opinion.

Mr. F. W. Houghton and *Mr. W. E. Chilton,* with whom *Mr. George B. Edgerton* and *Mr. Thomas H. Gill* were on the brief, for appellant:

The motion to dismiss should be denied because the record clearly shows that the sole question decided by the court below was a single definite question of jurisdiction; it also clearly appears from the petition for appeal and the order granting it, that this appeal was taken to the Supreme Court to review the question of jurisdiction alone and hence is sufficient without a certificate. *Davis*

v. *C., C., C. & St. L. R. Co.*, 217 U. S. 157; *Re Jefferson*, 215 U. S. 130; *Excelsior W. P. Co.* v. *Pac. Bridge Co.*, 185 U. S. 282; *Shields* v. *Coleman*, 157 U. S. 168; *Re Lehigh Min. & Mfg. Co.*, 156 U. S. 322; *Huntington* v. *Laidley*, 176 U. S. 668; *Interior Const. Co.* v. *Gibney*, 160 U. S. 217; *Smith* v. *McKay*, 161 U. S. 355.

The record clearly shows that the sole question decided by the court below was one of jurisdiction and no certificate is in such case required. Cases *supra* and *United States* v. *Larkin*, 208 U. S. 333, 338; *Chicago* v. *Mills*, 204 U. S. 321; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487; *Harkrader* v. *Wadley*, 172 U. S. 148.

The jurisdiction of the Circuit Court as a Federal court was involved in this controversy because no lawful voluntary general appearance by the defendant was or could be made therein; and because of the failure to lawfully serve the defendant with any process. Cases *supra*, and *Shepard* v. *Adams*, 168 U. S. 618; *Kendall* v. *Amer. Automatic Loom Co.*, 198 U. S. 477; *Board of Trade* v. *Hammond*, 198 U. S. 424.

The entire controversy in the court below was whether or not the decree of dissolution of the American Guaranty Company of Chicago and the appointment of Receiver Black of the assets of such corporation within the jurisdiction of such court under the provisions of §§ 57, 58 and 59, Chap. 53, Code of West Virginia, 3d ed., p. 510, so ended the life and power of such corporation and its officers that it could not thereafter by such officers or attorneys enter a general appearance in the Federal court so as to give such court jurisdiction in such action. Alderson on Receivers, pp. 4, 19, 20, 79, 80, 276, 277, 387, 523; *White* v. *White*, 130 California, 597; Clark & Marshall on Private Corp., § 319, pp. 912, 913; *Conklin* v. *Shipbuilding Co.*, 140 Fed. Rep. 219; *American Nat'l Bank* v. *Nat'l Benefit Co.*, 70 Fed. Rep. 420; *Pendleton* v. *Russell*, 144 U. S. 640; *United States* v. *Larkin*, 208 U. S. 333, 338, *Chicago* v.

Mills, 204 U. S. 321; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487; *Harkrader* v. *Wadley*, 172 U. S. 148.

Mr. Levy Mayer for appellees:

This appeal should be dismissed because no certificate of jurisdiction was obtained from the Circuit Court and no equivalent of a certificate of jurisdiction is shown by the record. *Courtney* v. *Pradt*, 196 U. S. 89; *Filhiol* v. *Torney*, 194 U. S. 356; *Chappell* v. *United States*, 160 U. S. 507; *The Bayonne*, 159 U. S. 687, 693; *Shields* v. *Coleman*, 157 U. S. 168, 176.

The jurisdiction of the Circuit Court as a Federal court was not involved within the meaning of the act allowing a direct appeal to this court. The subject-matter was a controversy as to the possession of the property of a corporation, between a receiver appointed by the Federal court and a receiver subsequently appointed by a state court, and involved the construction of the West Virginia statutes, and a question of general law. *Fore River Ship Building Co.* v. *Hagg*, 219 U. S. 175; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Courtney* v. *Pradt*, 196 U. S. 89; *Bache* v. *Hunt*, 193 U. S. 523; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424; *Schweer* v. *Brown*, 195 U. S. 171.

The receiver appointed in the West Virginia dissolution proceedings was not a statutory receiver, but was a mere chancery act receiver, and as such he was not invested by statute with the title to the property of the corporation that had been dissolved or made the legal successor of such corporation.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from the Circuit Court taken by an intervenor on the ground that the court never had ob-

tained jurisdiction over the defendant. The petition to intervene was dismissed, the decree declaring that the court had jurisdiction, that there was no equity in the petition and that the petitioner was not entitled to any of the relief prayed for. The court allowed the appeal but certified that in its opinion no question of jurisdiction was involved. The appellant contends that the contrary appears on the face of the record. *United States* v. *Larkin*, 208 U. S. 333. *The Steamship Jefferson*, 215 U. S. 130, 137. *Herndon-Carter Co.* v. *James N. Norris, Son & Co.*, 224 U. S. 496.

The material facts are these. On February 1, 1909, there was filed in a local court of West Virginia a bill for the dissolution of the American Guaranty Company, a corporation of that State. The corporation appeared and consented and on the same day a decree was entered dissolving the corporation, appointing a receiver to whom Keatley is successor, and directing him to take the steps necessary to secure possession of the company's property within the jurisdiction of the court. By the charter of the company its principal office was to be in Chicago, and in fact its bank deposits, bonds, &c., were almost wholly there. On February 2, the suit now before this court was brought in the Circuit Court of the United States for the Northern District of Illinois on the ground that the West Virginia receiver had no authority outside of his State, praying for a receiver and the distribution of the assets collected. There was an appearance and consent in the name of the corporation, a receiver was appointed and he proceeded to collect the assets. It is stated by the judge in his opinion that more than 7000 out of the 7030 claims against the company had been presented in the cause. On October 27, 1909, the West Virginia receiver filed his petition of intervention, setting up that the corporation, having been dissolved, could not appear in the suit.

Whether the exception to the general rule concerning jurisdiction of appeals like this established by *Shepard* v. *Adams*, 168 U. S. 618, and *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, applies to the present case, and what may be the merits of the argument against the right to appear in the name of the corporation, if the question is open, cannot be considered until the petitioner's right to present that argument is made out. On that matter we will assume that, if the petitioner had a case below, the denial of the right to intervene was not a discretionary decision and final on that ground. *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315, 316. But of course the petitioner's standing in the lower court depended on his having title, and was not a consequence of his West Virginia appointment alone unless at least he got a title by virtue of it, as it was provided by statute in express terms that the receiver should, in *Relfe* v. *Rundle*, 103 U. S. 222. See *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 574. The effect of such a provision need not be considered in this case. In some instances, at least, it would be enforced outside of the State. *Bernheimer* v. *Converse*, 206 U. S. 516, 534. *Converse* v. *Minnesota Thresher Manufacturing Co.*, 212 U. S. 567. *Converse* v. *Hamilton*, 224 U. S. 243, 257. See *Chipman* v. *Manufacturers' Nat. Bank*, 156 Massachusetts, 147, 148, 149. *Haskell* v. *Merrill*, 179 Massachusetts, 120, 124. The statute of West Virginia on the other hand provides for the appointment of receivers to 'take charge of and administer' the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter. Code, ch. 53, §§ 58, 59. It seems, to be sure, that in September and October the local West Virginia court purported to authorize and confirm a deed by a special commissioner to the receiver, but if the statute did not itself constitute the receiver the universal successor of the corporation, see *Chipman* v. *Manufacturers' Nat. Bank*, 156

Massachusetts, 147, 148, 149, it may be doubted whether the deed had extraterritorial effect. See *Fall* v. *Eastin*, 215 U. S. 1. The argument is strong to support the judgment of the court below that no title passed.

Right or wrong that was the decision of the Circuit Court, and it is obvious that a dismissal of the petition on that ground does not warrant a direct appeal, whether the court had jurisdiction or not. The court had jurisdiction over the intervention and decided against it on the merits. That question logically and chronologically preceded any question of jurisdiction in the principal case. The question of jurisdiction in the principal case was not yet open, as there had been no final decree therein, and as by virtue of the decision that the intervenor had no standing, the question could not be raised by him. The form of the decree really made it impossible for this appeal to be entertained, but we have discussed the case and stated the facts more at length in order to explain that the judge was right in his certificate and could not have acted otherwise upon his view of the West Virginia law.

Appeal dismissed.

WILLIAMS *v.* CITY OF TALLADEGA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 44. Argued November 7, 8, 1912.—Decided December 23, 1912.

The privilege given telegraph companies under the act of July 24, 1866, to use military and post roads of the United States for poles and wire, was permissive and did not create corporate rights and privileges to carry on the business of telegraphy.

The corporate rights and privileges were derived from the laws of the State of incorporation.

The permission given by the act of 1866 does not prevent a State from

taxing the real or personal property of a telegraph company within its borders or from imposing a license tax upon the right to do a local business within the State. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, distinguished.

Unless there is a claim that a Federal right is violated the reasonableness of a municipal license ordinance is for the State to determine.

In determining its validity this court must consider a municipal ordinance as it has been construed by the highest court of the State.

An agency of the Federal Government in the execution of its sovereign power is not subject to the taxing power of the State.

An ordinance which taxes without exemption the privilege of carrying on business, part of which is a governmental agency such as telegraphy, and makes no exemption of that class of the business, includes its transaction and is void as an unconstitutional attempt to tax a Federal agency.

Where, as in this case, the part of the license exacted necessarily affects the whole it makes the entire tax unconstitutional and void.

164 Alabama, 633, reversed.

THE facts, which involve the validity of an ordinance of a municipality in Alabama to impose a license fee on telegraph corporations transacting an intrastate business without exempting messages sent by the Government, are stated in the opinion.

Mr. Rush Taggart and *Mr. William M. Williams*, with whom *Mr. John F. Dillon*, *Mr. George H. Fearon*, *Mr. F. N. Whitney* and *Mr. Roy Rushton* were on the brief, for plaintiff in error:

The act of July 24, 1866, §§ 5263–5268, Rev. Stat., granted to the telegraph company accepting its provisions the right to go into any State, and as an agency of the Government to construct, operate and maintain telegraph lines along, over and upon the post roads, and over, under or across the navigable waters of the United States.

No State by legislation can prevent the construction of telegraph lines. The right to maintain and operate is given as fully and completely as the right to construct. This right is not simply to operate from point to point

within the State as a government agent for the transmission of government messages, but also to operate for any and all business which may be offered the telegraph company, interstate and intrastate, government and private messages alike. *Charles River Bridge Case*, 11 Pet. 420, 557; *United States* v. *Denver Ry. Co.*, 150 U. S. 1; *Brown* v. *Maryland*, 12 Wheat. 436, 467.

A franchise was granted to the telegraph company by Congress. *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 35; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460.

The property of a corporation of the United States may be taxed by a State, but not through its franchise. *Cent. Pac. R. R. Co.* v. *California*, 162 U. S. 92.

The legislation leading to the act of July 24, 1866, originated in the Senate at the first session of the 39th Congress. The legislative history of the act as it appears in Cong. Globe, pt. 2, 1st Sess., 39th Cong., p. 979, and Report of the Postmaster General, on the subject of a postal telegraph, laid before the Senate, and by it referred on June 4 to a select committee, shows clearly that with respect to intrastate as well as interstate business under this act of July 24, 1866, the Western Union Telegraph Company was created an instrumentality of the Federal Government, and endowed with a franchise to construct, maintain and operate telegraph lines on the post roads of the United States, with the duty, in the operation of these lines, to serve not only the Government of the United States under the conditions named in the act, but also to serve the public which might want to transact business over its lines.

This being so, then clearly an attempt to impose a license tax upon the company, either by any State or municipality, is an attempt to require, as a condition to the exercise of this government franchise within the State, the payment of a tax upon the grant so made by the Government. This is not permissible. See *West. Un.*

Tel. Co. v. *Massachusetts*, 125 U. S. 530; *Carthage* v. *First National Bank*, 71 Missouri, 508; *National Bank* v. *Chattanooga*, 8 Heisk. (Tenn.) 814.

Upon the question as to the right of the State or municipality arbitrarily thus to exclude the telegraph company, see *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56.

The ordinance cannot be sustained as an act coming within the police power of the City of Talladega. *West. Un. Tel. Co.* v. *New Hope*, 187 U. S. 419; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64, do not apply, as no expense whatever was incurred in the way of police inspection or supervision in this instance.

If license fees at the average rate obtaining in Georgia, Alabama, Virginia and South Carolina for the year 1912 had been applied in all the States of the Union at cities, towns and villages where offices are maintained by the telegraph company, the total license fees would have amounted to $659,973.60 in addition to all other taxes now paid.

There is no exclusion from the ordinance of the right to do government business within the State, and the right to transact such business is likewise clearly within the prohibitions of the ordinance until the telegraph company has paid the amount demanded. *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Neill, Moore & Co.* v. *Ohio*, 3 How. 720.

If a municipality may by an ordinance like this demand all the net revenue of a telegraph company as a consideration for the privilege of doing business with other points within the State, it is clear that the offices maintained in a State for both interstate and intrastate business may in time be required to be supported wholly by the interstate commerce business. This would result in abandoning many offices, thus depriving the Government of many of the facilities now available to it, and which have been

constructed and operated by the telegraph company under the act of Congress of July 24, 1866.

Congress has the power to grant a franchise to do an intrastate as well as an interstate telegraph business on the post roads of the United States. *Leloup* v. *Mobile*, 127 U. S. 640; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530.

Since Congress by the act of 1866, conferred upon the Western Union Telegraph Company the right to do an intrastate telegraph business along the post roads, the City of Talladega cannot impose a license tax thereon. *McCullough* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of U. S.*, 9 Wheat. 740; *West. Un. Tel. Co.* v. *Visalia*, 149 California, 744; *West. Un. Tel. Co.* v. *Lakin*, 101 Pac. Rep. 1094; *West. Un. Tel. Co.* v. *Wright*, 185 Fed. Rep. 250; *Harmon* v. *Chicago*, 147 U. S. 396; *Moran* v. *Chicago*, 112 U. S. 69; *California* v. *Cent. Pac. Ry. Co.*, 127 U. S. 1, 45; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Union Pac. R. R. Co.* v. *Peniston*, 18 Wall. 5.

The ordinance is in contravention of the laws of the United States, in that it fails to exclude messages sent on Government business within the State. *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Leloup* v. *Port of Mobile*, 127 U. S. 650.

The ordinance is invalid for the reason that the license imposed is for revenue and not for police regulation or inspection. *Postal Tel. Co.* v. *Taylor*, 192 U. S. 64; *Sunset Tel. Co.* v. *Bedford*, 115 Fed. Rep. 202; *Ottuma* v. *Zekind*, 95 Iowa, 622; *Chaddock* v. *Day*, 75 Michigan, 527; *Austin* v. *Murray*, 16 Pick. (Mass.) 126.

The City of Talladega has no right to arrest an operator of the Western Union Telegraph Company for violating a license ordinance.

The telegraph company in the transmission of government messages is in the service of the Government as is a

rural mail carrier. *Ex parte Conway*, 48 Fed. Rep. 77; *Re Matthews*, 122 Fed. Rep. 248, 259.

The ordinance is unreasonable and therefore void.

When an ordinance imposes a license that is unreasonable in amount, the ordinance is for that reason void. *Ex parte Byrd*, 84 Alabama, 17, 20; *Hendrick* v. *State*, 142 Alabama, 43, 46; *Marion* v. *Chandler*, 6 Alabama, 899, 901; *Ex parte Frank*, 52 California, 606; *Postal Tel. Co.* v. *New Hope*, 192 U. S. 55; *Ottuma* v. *Zekind*, 95 Iowa, 622; *Simrall* v. *Covington*, 90 Kentucky, 444; *Brooks* v. *Mangan*, 86 Michigan, 576; *Chaddock* v. *Day*, 85 Michigan, 527; *St. Paul* v. *Laidler*, 2 Minnesota, 190.

Mr. J. K. Dixon for defendant in error:

The first point insisted on by counsel for plaintiff in error is that the franchise of the company to do business in Talladega is derived solely from Congress, and is therefore not taxable by the city for the purpose of revenue. While this court has held that where the privilege or license tax is for the use of the city and imposed upon the company's business generally it must be charged solely under police power and should be approximately what it cost for police protection and inspection, *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92, a different rule applies where the same is limited to a license based solely on intrastate business. In such a case the charge can be made both as a police regulation and for the purpose of raising revenue. This court has held in numerous cases that, notwithstanding a telegraph company has accepted the conditions of the act of July 24, 1866, a license fee may be imposed on such company for business done exclusively within the State. *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692; *West. Un. Tel. Co.* v. *Texas*, 105 U. S. 460; *Ratterman* v. *West. Un. Tel. Co.*, 127 U. S. 411; *West. Un. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *West. Un. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *West. Un. Tel. Co.* v. *Missouri*, 190 U. S.

412; *West. Un. Tel. Co.* v. *Seay*, 132 U. S. 472. See also 37 Cyc. 1622; *Williams* v. *Talladega*, 164 Alabama, 633; *West. Un. Tel. Co.* v. *Freemont*, 26 L. R. A. 698.

The second proposition which is urged in the brief of counsel for plaintiff in error is that even if this court followed the former decisions on this question, notwithstanding this, it will declare this ordinance invalid because of the fact that governmental messages are not excluded from this ordinance.

In this case the tax is limited in the terms of the ordinance levying it to the business of sending messages between points exclusively within the State. The fact that a part of the business done by the company consists in the sending of messages for the Government does not affect the right of the State to impose a reasonable privilege tax. Whether government messages are transmitted at a reduced rate which has material effect upon the company's income at Talladega, is the subject of proof and must be taken into account when passing upon the reasonableness of the license charged. *Moore* v. *Eufaula*, 97 Alabama, 670.

There is no evidence showing that any governmental messages were sent by the Talladega office on which any fees were charged.

This court will only consider an objection of this character, if the city or State has authority to fix a license, where it is so unreasonable that it amounts practically to confiscation. The ordinance in this case does not impose an unreasonable license fee. This court cannot review the state court as to the amount. *Postal Tel. Co.* v. *Charleston*, 153 U. S. 692, 699. If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power. *Troy* v. *West. Un. Tel. Co.*, 164 Alabama, 482.

The evidence does not show anything as to business

year in and year out, which would justify the court in pronouncing the tax in question to be void. *Williams* v. *Talladega*, 164 Alabama, 633; *Atlantic Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Nashville & Chattanooga R. R.* v. *Attalla*, 118 Alabama, 362.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to review the judgment of the Supreme Court of the State of Alabama affirming the judgment of the City Court of Talladega. 164 Alabama, 633.

D. G. Williams, the plaintiff in error, was convicted of doing business in the City of Talladega, as agent of the Western Union Telegraph Company, from October 1, 1908, to December 31, 1908, without taking out and paying for a license, in violation of an ordinance of the city. The ordinance contained a schedule of licenses for divers businesses, vocations, occupations and professions carried on in the city, among others, the following:

"158. Telegraph Company. Each person, firm or corporation commercially engaged in business of sending messages to and from the City to and from points in the state of Alabama for hire or reward. . . . $100."

Section 2 of the ordinance declared that the license was exacted in the exercise of the police power of the city, as well as for the purpose of raising revenue for the city. The fourth section provided that any person, firm or corporation who engaged in any trade, business or profession for which a license was required, without first having obtained such license, should be guilty of an offense and upon conviction should be fined not less than one and not more than one hundred dollars, and that each day should constitute a separate offense.

The record discloses that the corporation was organized

under the laws of the State of New York and had accepted the provisions of the act of Congress of July 24, 1866, 14 Stat. 221, c. 230 (Rev. Stat., §§ 5263–5268) and for several years theretofore and during the years 1907 and 1908 had had an office in the City of Talladega and was engaged in the business of transmitting messages between private parties and between the departments and agencies of the United States Government from Talladega to other points in the State of Alabama and also from other points in the State of Alabama to Talladega; that during the months of October, November and December, 1908, Williams was employed by the Western Union Telegraph Company as manager of its office at Talladega; that a license fee of $25 was demanded of him for the quarter ending December 31, 1908, which was refused, and that he was fined $25 and costs, and in the event of his failure to pay the fine and costs he was sentenced to labor on the streets for fifty days. It also appears that the Western Union Telegraph Company pays taxes on its property in the State. In addition to the agreed facts, from which the above statement is taken, it is shown by the testimony of the defendant that the lines of the Western Union Telegraph Company enter and leave the city over the right of way of the Southern Railroad and the Louisville and Nashville Railroad, both of which are public railroads, and that within the City of Talladega the company has lines which leave the right of way of the railroad companies and proceed along public streets to the office of the company; and also that government messages were relayed daily at the Talladega office; that it received messages between the different departments of the Government of the United States at this office from points within the State; and that government messages were given a preference and were sent at reduced rates. From the testimony, the Supreme Court of Alabama found that for the year 1908, not including the month of January, the

company did its intrastate business at a net loss of eighty-six cents.

This case differs from some cases which have been in this court involving the right to tax the Western Union Telegraph Company, in that it places emphasis upon the alleged immunity from taxation of the class herein involved, because, it is contended, by the act of 1866, Congress, by virtue of the authority given it to establish post roads, conferred Federal franchises upon the company and made the Western Union Telegraph Company an instrumentality of the Federal Government, endowed with franchises to construct, maintain and operate telegraph lines on the post roads of the United States, with the duty in the operation of those lines not only to serve the Government of the United States, but also to serve the public which might wish to transact business over its lines. This being so, it is now insisted that the attempt to impose a license tax upon the company, either by the State of Alabama or any of its municipalities, is an attempt to impose a tax on the franchises so created by the Federal Government.

The question made upon this point was considered in *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692. In that case the Postal Telegraph Cable Company had accepted the provisions of the act of 1866, and the state statute imposed a license of $500 upon the telegraph company for business done exclusively within the City of Charleston, not including any business done to or from points without the State and not including any business done by the officers of the United States. It was contended for the telegraph company that the license required by the ordinance was a tax upon it for the privilege of exercising its franchise within the City of Charleston; that the telegraph company having constructed its lines along post roads in the City of Charleston and elsewhere, no state or municipal authority could collect a license fee

from it for the privilege of conducting its business, "*thus restraining the powers possessed by it under its franchises and under the acts of Congress,*" and furthermore that the ordinance in question was an interference with interstate commerce and therefore void. It will thus be seen that in that case not only was the contention made as to the interstate commerce feature of the telegraph company's business, but it was specifically claimed that to exact such a license would restrain the powers possessed by it under the franchises created by the act of Congress. After reviewing a number of cases, Mr. Justice Shiras, who delivered the opinion of the court, said (p. 700):

"It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the City of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the Government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866 (Rev. Stat., §§ 5263–5268), are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the State in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited."

In *Western Union Telegraph Co.* v. *Gottlieb*, 190 U. S. 412, this court, again considering the act of 1866, after quoting from the opinion of Mr. Justice Miller in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, said (p. 423), speaking by Mr. Justice McKenna:

"These propositions were laid down: That the company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the State under which it was organized; that the privilege of running the lines of its wires over and along the mili-

tary and post roads of the United States was granted by the act of Congress, but that the statute was merely permissive and conferred no exemption from the ordinary burdens of taxation; that the State could not by any specific statute prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed in exchange for the protection it received from the State 'upon its real or personal property as any other person would be.' And describing the particular tax imposed it was said:

"'The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution.'"

In the latest utterance of this court upon the subject under consideration, *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, Mr. Justice Holmes, delivering the opinion of the court, said (p. 169):

"The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domian. *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540, 574. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1. It has been held to prevent a State from stopping the

operation of lines within the act by injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. But except in this negative sense the statute is only permissive, not a source of positive rights."

These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State. Nor is there anything running counter to the former cases in the case of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, wherein it was held that the attempt to levy a graded charter fee upon the entire capital stock of the Western Union Telegraph Company, a corporation of another State, engaged in commerce among the States, as a condition to the right to do local business within the State of Kansas, was void as an attempt, when the substance of things was reached, to tax the right of the company to do interstate business within the State and as a tax upon property beyond the limits and jurisdiction of the State.

It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the State to determine. It is contended that the result of the tax upon the intrastate business conducted at a loss is to impose a burden upon the other business of the company and is therefore void. The Supreme Court of Alabama,

however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right.

It is further contended that this ordinance is void because it makes no exception as to the sending of government messages. In this respect it is suggested in the brief of the defendant in error that the ordinance may be construed as not to include business transacted by the company as an agency of the Government, and as applying only to commercial business of a different character; but, in view of the construction which the Supreme Court of Alabama has placed upon it, we must consider the ordinance as construed by that court. Upon the authority of a previous case (*Moore* v. *Eufaula*, 97 Alabama, 670), it held the ordinance valid, although it does not exclude messages sent for the Government of the United States. In this connection it said:

"The fact that a part of the business done by the company consists in the sending of messages for the government does not affect the right of the state to impose a reasonable privilege tax, . . ."

We therefore have to consider whether a license tax by a State on the doing of business within the State, including the transmission of government messages, by a telegraph company which has accepted the terms of the act of 1866, can be lawfully imposed. By the act of 1866 government messages are given priority over all other business and are transmitted at the rates annually fixed by the Postmaster General; and before the telegraph companies exercise any of the powers or privileges conferred by the law they are required to file with the Post-

master General their written acceptance of the restrictions and obligations of the act (Rev. Stat., §§ 5266 and 5268).

This court has had occasion to consider the effect of this legislation and the acceptance of its terms by the telegraph company, so far as the transmission of government telegrams and the transaction of government business is concerned. In the case of *Telegraph Co.* v. *Texas*, 105 U. S. 460, an ordinance was held void which required the company to pay a tax of one cent for all full rate messages sent, and one-half cent for every message less than full rate. This was in addition to taxes paid by the company on real and personal property in the State. The ordinance was held void as levying a tax upon interstate messages and also void in so far as it undertook to tax the transaction of government business. After declaring that as to such business companies which had accepted the terms of the act became government agencies, this court, speaking by Mr. Chief Justice Waite, said (p. 464):

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States."

And, after dealing with the interstate commerce feature of the law, said (p. 466):

"As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and therefore,

void. It was so decided in *McCulloch* v. *Maryland* (4 Wheat. 316), and has never been doubted since."

The ordinance sustained in *Postal Telegraph Cable Co.* v. *Charleston, supra,* expressly excluded interstate and government messages.

Were it otherwise, an agency of the Federal Government, in the execution of its sovereign power, would be at the mercy of the taxing power of the State. It is enough in this connection to refer to the cases of *McCulloch* v. *Maryland, supra; Osborn* v. *Bank,* 9 Wheat. 738; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *California* v. *Central Pacific R. R. Co.,* 127 U. S. 1; *Central Pacific R. R. Co.* v. *California,* 162 U. S. 91.

We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole and makes the tax unconstitutional and void. In *Leloup* v. *Port of Mobile,* 127 U. S. 640, Mr. Justice Bradley, speaking for the court, said (p. 647):

"It is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination." And see *Western Union Co.* v. *Alabama Assessment Board,* 132 U. S. 472, 477; *Allen* v. *Pullman Car Co.,* 191 U. S. 171, 179.

For this reason we think the judgment of the Supreme Court of Alabama should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

EX PARTE UNITED STATES, PETITIONER.

PETITION FOR WRIT OF PROHIBITION.

No. 10, Original. Submitted December 16, 1912.—Decided January 6, 1913.

Unless the repeal be express or the implication to that end be irresistible, a general law does not repeal a special statutory provision affording a remedy for specific cases. *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487.

The special provisions of the Expedition Act of February 11, 1903, 32 Stat. 823, c. 544, requiring in a particular class of cases the organization of a court constituted in a particular manner, were not repealed by the Judicial Code of 1911.

The new District Court created by the Judicial Code of 1911 is the successor of the formerly existing Circuit Court and as such is vested with the duty of hearing and disposing of cases under the Expedition Act of 1903, § 291.

Section 291 of the Judicial Code of 1911 expressly confers powers of the Circuit Court upon the now existing District Courts.

Under the Expedition Act of 1903 a court composed as required by that act may be organized at the request of the United States to consider the plan to carry out the decree of this court holding a combination unlawful under the Sherman Anti-trust Act.

In this case the district judge having refused to organize a court under the Expedition Act to determine the form of decree to be entered under the mandate of this court, this court issues its writ of prohibition directed to the district judge against entering a decree.

THE facts, which involve the construction of the Expedition Act of 1903 and the question of whether certain provisions of the Judicial Code of 1911 conflict therewith, are stated in the opinion.

The Attorney General and *Mr. Edward C. Crow*, Special Assistant to the Attorney General, for petitioner.

Mr. Henry S. Priest for the respondent.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The matter before us concerns the execution of the decree in *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383. That case, which involved violations of the Sherman Anti-trust Act, was commenced in the Circuit Court of the United States for the Eastern District of Missouri, was there decided by four circuit judges in consequence of the filing by the Attorney General of the United States of the certificate provided for by the act of February 11, 1903 commonly known as the Expedition Act, c. 544, 32 Stat. 823. While the case was here pending, the Judicial Code of March 3, 1911, 36 Stat. 1087, c. 231, was adopted, and hence our mandate was directed to the District Court of the United States for the Eastern District of Missouri, the successor of the Circuit Court.

Upon the filing of the mandate in that court, the judge of the District Court being disqualified, District Judge Trieber, of the District Court of Arkansas, was assigned to sit in the cause. Disagreement between the parties having arisen as to what plan of reorganization should be adopted to carry out the mandate of this court, and the court below having expressed its intention to adopt by a final decree a plan to which the Government did not assent, objection was made by the United States to proceeding further, upon the ground thus stated by the court below in its opinion

" . . . as a certificate under the Expedition Act was filed when the action was originally instituted, the decree on the mandate could not be entered by a single judge, but only by at least three circuit judges, in conformity with the Expedition Act above referred to."

The suggestion having been overruled by a formal order and fruitless effort having been made to induce action

by the senior circuit judge who was also the senior circuit judge who had participated in the original decision of the cause, the interposition of this court by the proceeding before us was invoked. The judge below evidently only desirous of being informed as to his duty, after leave to file the application for prohibition was here granted, has submitted the issue on the opinion of the court below and upon printed argument for both parties, as if on a return to a rule to show cause why the writ should not issue.

In refusing to apply the Expedition Act the court below, "assuming without deciding that the Judicial Code does not repeal the Expedition Act," based its refusal upon the ground that the proceeding to enforce the mandate of this court was not within the intendment of the Expedition Act because not a matter requiring the hearing contemplated by that act. This view was maintained by conclusions as to the general nature of the duty to give effect to a decree already rendered and by considerations based upon the opinion that the decree of this court was so specific as to leave no room for discussion and therefore to afford no occasion for organizing a tribunal constituted in accordance with the requirements of the Expedition Act. In the printed argument, however, upon which the matter has been here submitted, the action of the court is sought to be sustained upon a much broader ground, viz., that as by the Judicial Code the Circuit Courts were abolished, it has become no longer possible to organize a court in accordance with the Expedition Act, because that act by implication has been repealed by the Judicial Code. Thus, after commenting upon the provisions of the Judicial Code, it is said:

"The Judicial Code (Sec. 1, Chap. I) provides for a District Judge for each District Court.

"There is no provision for the exercise of any judicial authority by any circuit judge, except by special appointment, pursuant to the provision of Sec. 18, Chap. I, of

the Code. He then derives his power from such appointment and from no other source. As Circuit Judges they have no authority in the enforcement of the jurisdiction of the District Courts.

"After devolving upon the District Courts the jurisdiction formerly possessed by the abolished Circuit Courts, the Code (Chap. VI) creates a Circuit Court of Appeals, and provides (Sec. 117):

"'There shall be in each circuit a Circuit Court of Appeals which shall consist of three judges, . . . which shall be a court of record with appellate jurisdiction as hereinafter limited and established.'

"It must be conceded, in view of this legislation, if this suit was now instituted, it could only be heard by a District Judge unless some Circuit Judge should be appointed under the provisions of Sec. 18, Chap. I, to discharge the functions of a District Judge and the case be brought before him in that capacity."

But the contention is faulty, because although the premise upon which it rests be conceded, the deduction drawn from it is unwarranted. It is of course undoubted that Chap. XIII of the Judicial Code, while not interfering with the tenure of office of the circuit judges, abolished the Circuit Courts. It is also undoubted that by that act the District Courts provided for were made the successors of both the Circuit and District Courts which had theretofore existed and were in a general sense endowed with the jurisdiction and power theretofore vested in such prior courts. It is moreover beyond question that the statute, while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occasion requires (§ 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice, of a circuit judge to hold a District Court and endows a judge so assigned with all

the authority of a district judge (§ 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (§ 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law.

The question, therefore, reduces itself to this: Were the special provisions of the Expedition Act requiring in a particular class of cases the organization of a court constituted in a particular manner repealed by the Judicial Code? This is the only question, because if that act was not repealed by the Code, then its provisions amount to an assignment by operation of law of the circuit judges to sit as judges of the District Court for the purpose of discharging the duties imposed by the act. When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497. That the new District Court created by the Judicial Code was vested with the duty of hearing and disposing of the cases provided for in the Expedition Act as the successor of the formerly existing Circuit Court, as we have already stated, is undoubted. The mere fact that the Expedition Act in terms refers to the organization of a Circuit Court would be, as a general rule, under the circumstances, of no importance, and becomes absolutely without significance in view of the express provision of Chap. XIII, § 291, of the Judicial Code, saying: "Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall,

upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

The Expedition Act being therefore still in force and its provisions being applicable to the District Courts which the Judicial Code created, we think the court below erred in concluding that the United States was not entitled to a District Court organized in the mode pointed out in the Expedition Act unless it be, as stated by the lower court in its opinion, the subject in hand was of such a character as not to be within the scope of the Expedition Act. Coming to consider that question without going into any elaboration, we are of opinion that error was committed in so holding. While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendants to submit a plan in order to carry out the decree and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event and especially in case of controversy on the subject. These considerations, we think, brought the subject within the scope of the Expedition Act and justified the request of the United States that the case be considered and a decree entered by a court composed as provided in that act.

Writ of prohibition to issue.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* HARDWICK FARMERS ELEVATOR COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 25. Argued November 25, 1912.—Decided January 6, 1913.

By the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, Congress legislated concerning the deliveries of cars in interstate commerce, and made it the duty of the carrier to provide and furnish transportation.

There can be no divided authority over interstate commerce, and regulations of Congress on that subject are supreme.

As to those subjects upon which the States may act in the absence of legislation by Congress, the power of the State ceases the moment Congress exerts its paramount authority thereover.

Since the enactment of the Hepburn Act it is beyond the power of a State to regulate the delivery of cars for interstate shipments, and so *held* as to the Reciprocal Demurrage Law of Minnesota of 1907.

110 Minnesota, 25, reversed.

A STATUTE passed by the legislature of the State of Minnesota and known as the Minnesota Reciprocal Demurrage Law, became effective on July 1, 1907. Laws of Minnesota, 1907, chapter 23.

The law, among other things, made it the duty of a railway company subject to its provisions, on demand by a shipper, to furnish cars for transportation of freight, at terminal points on its line of road in Minnesota within forty-eight hours and at intermediate points within seventy-two hours after such demand, Sundays and legal holidays excepted. For each day's delay in furnishing cars when so demanded—except when prevented by strikes, public calamities, accident, or any cause not within the power of the railroad to prevent—the defaulting company was made liable to pay to the shipper one

dollar per car together with the damages sustained and a reasonable attorney's fee.

Alleging that in respect of delays in the deliveries to it of fourteen freight cars, pursuant to eight applications made for such cars between September 19, 1907, and October 22, 1907, the first section of the act in question had been violated, the Hardwick Farmers Elevator Company, defendant in error here, commenced this action in a district court of Minnesota to recover from the railway company, plaintiff in error here, penalties aggregating two hundred and eighteen dollars and an attorney's fee of fifty dollars, together with the costs and disbursements of the action. As a defense the railway company set up that the cars in question were demanded for the purpose of interstate traffic and that the delays complained of were occasioned solely by an unusual and unprecedented congestion of traffic and a consequent scarcity of cars arising from their use in moving traffic and commerce between the States, and that such delays therefore arose from causes not within the control and power of the company. It was also claimed that if the statute in question embraced interstate commerce and was applied to the requisitions for cars referred to in the complaint it would be repugnant to the commerce clause and to the due process and equal protection clauses of the Constitution of the United States. The action was tried to a jury. The trial judge refused to give instructions asked for by the railway company embodying the constitutional objections made in its answer. A verdict was returned for the plaintiff for the amount claimed including an attorney's fee; and a judgment entered on the verdict was affirmed by the Supreme Court of the State. 110 Minnesota, 25.

Mr. M. V. Seymour, with whom *Mr. Edward C. Stringer* and *Mr. Edward S. Stringer* were on the brief, for plaintiff in error:

All of the consignments concerned in this suit are interstate shipments notwithstanding the fact that in some cases place of origin and place of destination are both in Minnesota. *Railroad Commission* v. *C., St. P. M. & O. Ry. Co.*, 40 Minnesota, 267; *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617.

The history of the act and the practical construction placed upon the so-called Reciprocal Demurrage Law by the state authorities and the Interstate Commerce Commission show that the gravest doubt has been expressed with respect to the validity of this measure, so far as it may concern interstate commerce.

The Interstate Commerce Commission, before commencement of this suit, had directed railway companies to disregard all laws of this character as applied to interstate commerce. See Tariff Circular No. 18 A, p. 108, Feb. 13, 1911, effective March 31, 1911, citing *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321. And see *Wilson Produce Co.* v. *Pennsylvania R. R. Co.*, 14 I. C. C. Rep. 170.

The authority vested in Congress by the commerce clause of the Constitution covers everything related to the delivery of freight, and transportation between the States. *Rhodes* v. *Iowa*, 170 U. S. 412, 426; *Bowman* v. *Chi. & N. W. Ry. Co.*, 125 U. S. 465; *McNeil* v. *Southern Ry. Co.*, 202 U. S. 543, 559; and see *Int. Com. Comm.* v. *Detroit, G. H. & Mil. Ry. Co.*, 167 U. S. 633.

If the individual States were permitted to legislate in this field, endless confusion and discrimination would be the result. Such legislation would operate as a direct burden upon interstate commerce. Cases *supra* and *Wabash, St. L. & Pac. Ry. Co.* v. *Illinois*, 118 U. S. 557; *Central of Georgia Ry. Co.* v. *Murphy*, 196 U. S. 194, 204.

The duty of regulating terminal charges when related to interstate transportation has been lodged with the

Interstate Commerce Commission. *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 719, 722; *Michie* v. *New York, N. H. & Hartford R. R. Co.*, 151 Fed. Rep. 694.

The nature of the Act to Regulate Interstate Commerce and the manifest purpose disclosed by it, especially by the Hepburn Amendment, is to assume and exercise complete control over all terminal charges in respect of interstate commerce.

State laws and decisions upon so-called reciprocal demurrage laws sustain these contentions. See Act of North Dakota, Ch. 153, 1907; Ch. 671, Laws of 1909, April 20, of California; Act of 1909 of Nebraska; § 2, Act No. 193, Arkansas, 1907; *St. Louis, I. M. & Sou. Ry. Co.* v. *Hampton*, 162 Fed. Rep. 693. But see *Oliver & Son* v. *Railway Co.*, 117 S. W. Rep. 238; *S. C.*, 89 Arkansas, 466; *St. L. & S. F. R. Co.* v. *Allen*, 181 Fed. Rep. 710; *Darlington Lumber Co.* v. *Missouri Pacific Ry. Co.*, 216 Missouri, 658; *C., R. I. & P. Ry. Co.* v. *Beatty*, 118 Pac. Rep. 367; *St. L. & S. F. R. R. Co.* v. *Oklahoma*, 107 Pac. Rep. 929; *Gulf, Col. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98; *Patterson* v. *Missouri Pacific Ry. Co.*, 77 Kansas, 236.

The North Carolina law penalizing railroad companies fifty dollars for each day's refusal to receive freight brought for shipment, was upheld, but by a divided court. *Reid & Beam* v. *Southern Railway Company*, 150 Nor. Car. 753. As to the rule in Virginia, see *Atlantic Coast Line* v. *Commonwealth*, 102 Virginia, 599; *Southern Railway Co.* v. *Commonwealth*, 107 Virginia, 771.

In Texas see *T. & B. Valley Ry. Co.* v. *Geppert*, 135 S. W. Rep. 164.

In Pennsylvania, see *Wilson Produce Co.* v. *Penn. R. R. Co.*, 14 I. C. C. Rep. 170; *Penn. R. R. Co.* v. *Coggins Co.*, 38 Pa. Super. Ct. 129.

The Hepburn Act especially refers to the duty of common carriers to furnish cars and instrumentalities of com-

merce. The congressional legislation upon this subject is broad, ample, uniform. A cunningly devised and insidious provision penalizing a railway company for not furnishing cars to a Minnesota shipper, when under the same circumstances no such penalty attaches to the failure to furnish cars to the shipper of another State, can have but one result: that is, preference. Otherwise, there would be no reason for the enactment of the Minnesota statute as applied to interstate commerce. If Minnesota can impose a penalty of one dollar per day per car for failure to furnish cars to be employed in interstate commerce, adjoining States will soon have a penalty of ten dollars or twenty dollars, or such amount as will insure preference in the delivery of cars.

If a shipper objects to a carrier's demurrage rule, he must make application to the Interstate Commerce Commission for relief. *Procter & Gamble* v. *United States*, 188 Fed. Rep. 221; *Southern Pacific Co.* v. *Campbell*, 189 Fed. Rep. 696.

A person engaged in conducting an interstate express business cannot be required by the state or municipal authorities to take out a local license as a prerequisite of conducting his interstate business within the State or municipality. *Barrett* v. *New York*, 189 Fed. Rep. 268.

Demurrage for the detention of cars either in loading or unloading, is a terminal charge required to be shown by the schedule of rates and to be filed and published by an interstate railroad company by the terms of the Interstate Commerce Act, as amended by the so-called Hepburn Law. *Lehigh Valley R. R. Co.* v. *United States*, 188 Fed. Rep. 879; and see also *Wilson Produce Co.* v. *Penn. R. R. Co.*, 14 I. C. C. Rep. 170, 174; *Peale, Peacock & Kern* v. *C. R. R. of N. J.*, 18 I. C. C. Rep. 25, 33; *Michie* v. *N. Y., N. H. & H. R. R. Co.*, 151 Fed. Rep. 694; *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 719; *Rhodes* v. *Iowa*, 170 U. S. 412; *Bowman* v. *Chicago &c. Ry.*, 125 U. S. 465;

McNeil v. *Southern Ry. Co.*, 202 U. S. 543; *Baltimore & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Int. Com. Comm.* v. *Illinois Central Ry.*, 215 U. S. 452; *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136; *Union Pacific Railroad Co.* v. *Updike Grain Co.*, 222 U. S. 215; *Southern Railway Co.* v. *Reid*, 222 U. S. 424; *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426, 437.

Mr. C. H. Christopherson for defendant in error:

The act is constitutional, and the term "reciprocal demurrage" is perhaps not the happiest expression and, as opposing counsel states, it may be a misnomer. A more suitable expression than "Reciprocal Demurrage Law" would be a "law to compel carriers to furnish cars." See *Lehigh Valley R. Co.* v. *United States*, 188 Fed. Rep. 879. While demurrage charges and reciprocal demurrage charges are dissimilar in their legal status, still the latter undoubtedly grew out of the former. *Yazoo & Miss. Valley Ry. Co.* v. *Keystone Lumber Co.*, 43 So. Rep. 605.

In twenty States reciprocal demurrage measures are pending or have been enacted. Nearly all the organizations in the country representing large shippers have asked for reciprocal demurrage.

The act seeks to protect the carrier as well as the shipper. It can only be invoked by those who apply for cars "in good faith" and it does not tolerate discrimination. Report of Attorney-General of Minnesota for 1906, p. 247.

Such a statute is advocated by shippers, railroad commissioners, courts, legislatures, etc.

The validity of such a statute is sustained by text-book writers, railroad commissioners, the Interstate Commerce Commission, legislatures, attorneys general and courts. Watkins on Shippers and Carriers, § 306; Calvert, Regulation of Commerce, Preface, p. 4.

A great majority of the courts entertain the view that

such statutes are constitutional. See *Houston & Texas Central* v. *Mayes*, 201 U. S. 321.

Under the Minnesota statute exceptions are made which remove it from the condemnation of the *Mayes Case*, and the trial court can always protect the railroads by defining the statutory phrases. *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136, can be distinguished. And see *New Mexico* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Railway Co.* v. *Jacobson*, 179 U. S. 287; *Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613; *Missouri, K. & T. R. Co.* v. *McCann*, 174 U. S. 580.

For decisions of state courts in regard to regulation of interstate commerce matters, see *Southern Railway Co.* v. *Virginia*, 107 Virginia, 771; *Oliver & Son* v. *Railway Co.*, 117 S. W. Rep. 328; *Patterson* v. *Railway Co.*, 77 Kansas, 236; *Southern Ry. Co.* v. *Atlanta Sand Co.*, 68 S. E. Rep. 807; *Martin* v. *Railway Co.*, 113 Pac. Rep. 16; *Chicago, R. I. & P. Ry. Co.* v. *Beatty*, 118 Pac. Rep. 367.

St. L. & S. F. R. R. Co. v. *Oklahoma*, 26 Oklahoma, 62, does not conflict with this case.

Congress has not legislated on the subject, nor has the Interstate Commerce Commission been vested with power in the premises. The Hepburn Act requirements are separate and apart from the purposes and objects of the Minnesota act.

The Hepburn Act took effect January 29, 1906. It was passed to remedy certain deficiencies found to exist in the previous act; but, in so far as it relates to the case at bar it is not broader than the original act.

The Interstate Commerce Commission has held that it had no authority to fix rules and regulations governing reciprocal demurrage. *Mason* v. *C., R. I. & P. Ry. Co.*, 12 I. C. C. Rep. 61; *Richmond Elevator Co.* v. *Railway*, 10 I. C. C. Rep. 629.

The cases cited by plaintiff in error can all be distinguished.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for, of cars to be used in interstate traffic. Thus counsel for the defendant in error urges the correctness of the action of the Supreme Court of Minnesota in sustaining the statute upon the hypothesis that Congress had not legislated on the subject and that the act was a reasonable exertion of the power of the State. On the contrary, on behalf of the Railroad Company it is insisted that even upon the assumption that the State had power to deal with the subject for which the statute provides in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one State, to the disadvantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act to regulate commerce the term "transportation" was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn Act it was declared that the term transportation (italics ours)—

"shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor*, and to establish through routes and just and reasonable rates applicable thereto."

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement § 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. Thus, by § 8 it is provided "That in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Further by § 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by § 10 it is made a criminal offense for an employé of a corporation carrier to "wilfully omit or fail to do any act, matter, or thing in this act required to be done."

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co.* v. *Reid*, 222 U. S. 424.

The judgment of the Supreme Court of Minnesota must therefore be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

HANNUM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 30. Argued December 9, 1912.—Decided January 6, 1913.

The assimilating clause of § 13 of the Navy Personnel Act of 1899 applies only to officers on the active list and does not repeal the prior laws respecting the pay of officers compulsorily retired under § 1454, Rev. Stat., for incapacity not resulting from any incident of the service.

A statute will not be so construed under an assimilation clause as to destroy legislation which Congress incorporated into the act after having it called to its attention.

The Personnel Act emphasizes the plain intent of Congress not to destroy the then existing standards of retirement for Navy officers, but to retain and add to those standards as distinguished from the standards of retirement fixed for the Army.

43 Ct. Cl. 320, affirmed.

THE facts are stated in the opinion.

Mr. George A. King for appellant.

Mr. Frederick DeC. Faust, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By an order dated October 22, 1900, the President approved the finding of a retiring board and directed that "Lieut. William G. Hannum, U. S. Navy . . . be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes." Thereafter Lieu-

tenant Hannum was paid the compensation fixed by § 1593 of the Revised Statutes, viz: "One half of the pay to which they" (officers placed on the retired list on furlough pay), "would have been entitled if on leave of absence on the active list."

Upon the contention that in virtue of the opening clause of § 13 of the Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, providing that officers of the line of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army, this action was brought to recover the difference between the sums actually paid to Lieutenant Hannum and the pay fixed by Rev. Stat., § 1274, of an officer of corresponding rank in the Army when placed on the retired list, viz. 75 per cent. of the pay of the rank upon which retired.

The Court of Claims held that the assimilating clause of § 13 of the Personnel Act applied only to officers on the active list of the Navy, and did not repeal the prior law respecting the pay of that particular class of officers compulsorily retired under § 1454, Revised Statutes, for incapacity not resulting from any incident of the service. In other words, the court decided that growing out of the differences between the distinct classifications made for the retirement of Navy officers and the pay allowed to such retired officers depending upon the causes for retirement and the differences in this respect existing between statutory regulations as to the retirement of Army officers, that the provision of the Personnel Act had not repealed the specific provisions as to the retirement of Navy officers and the retired pay to which such officers were entitled. Applying the construction which it thus gave to the statute the court denied the relief claimed, except for the sum of $31.42, balance of pay due for a short period of active service after retirement, and the Government has acquiesced in such allowance. 43 Ct. Cl. 320.

We think the court was right in the view which it took

of the so-called Personnel Act. The provisions of §§ 8, 9 and 11 of the act not only created a new class of retired officers of the Navy, but § 9 contains an express reference to "the provisions of law now in force," relating to retirements in the Navy. As said by counsel for the Government:

"By those laws the pay of all officers retired for age or incapacity resulting from long and faithful service, or wounds or injuries received in the line of duty, or from sickness and exposure therein, receive seventy-five per centum of the sea pay of their rank at the time of retirement, while all other officers on the retired list receive one-half the sea pay of the rank held by them at the time of retirement (Rev. Stat., § 1588), except officers retired on furlough pay for incapacity not of service origin, who receive only one-half the pay to which they would have been entitled if on leave of absence on the active list (sections 1454 and 1593)."

It thus being plain that the attention of Congress when it adopted the Personnel Act was specially drawn to the existing statutory regulations relating to the retirement of Naval officers and to the causes for which retirement should be allowed, and the amount of the retired pay of such officers and that provision was made as to these subjects varying radically from the system of Army retirement by providing different proportions of pay for different causes of Navy retirement, it is not open in reason to hold that Congress intended by the provision in question of the Personnel Act to destroy the legislation which it sedulously incorporated and made a part of that act. In other words, as the Personnel Act itself emphasizes the plain intention of Congress not only not to destroy the standards of retirement fixed for Navy officers, but on the contrary to retain and add to those standards, as distinguished from the standards of retirement fixed for the Army, we think the claim here made was properly dis-

allowed. Nothing could more aptly illustrate the necessity for this conclusion than by directing attention to the result which would inevitably follow from taking another view. Thus it may not be doubted that the express object of the Personnel Act was to give a right of retirement for long and distinguished services, for wounds contracted in the course of the service as distinguished from the ordinary right to retire. And yet if the construction of the statute now urged were to be upheld it would follow that an assimilation was made by the Personnel Act not only between the pay of officers on the active list of the Navy and those of the Army, but also between officers of the Navy themselves by putting on a parity as to retirement and retired pay all officers of the Navy, irrespective of the meritorious or non-meritorious character of their services and despite the clear distinction in that regard expressly provided for by the terms of the Personnel Act.

Affirmed.

ANDERSON, ADMINISTRATRIX, *v.* SMITH.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 91. Argued December 17, 1912.—Decided January 6, 1913.

The evidence in this case not showing that the injury suffered by the servant was caused by failure of the master to provide a safe place or proper appliances, the trial court rightly took the case from the jury, and directed a verdict for defendant.

35 App. D. C. 93, affirmed.

THE facts are stated in the opinion.

Mr. Leonard J. Mather, with whom *Mr. John Doyle Carmody*, was on the brief, for plaintiff in error.

Mr. H. Prescott Gatley, with whom *Mr. Samuel Maddox* and *Mr. Barry Mohun* were on the brief, for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White.

Charles P. Anderson was one of several workmen engaged in tearing down an old building in Georgetown in the District of Columbia. The building had been demolished as far as the first floor, and it became necessary to take down a large doorframe. While Anderson was engaged with others in that work the frame fell upon him and caused injuries from which he died. An administratrix was appointed and brought this action against the employer of Anderson to recover damages, basing the right of action upon alleged negligence in failing "to provide a reasonably fit, proper and safe place" for Anderson to work, and also in failing "to furnish reasonably fit and proper machinery, reasonable adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of such doorframe." At the trial, on the close of the evidence for the plaintiff, the court being of opinion that there was an utter failure of the proof to sustain the allegations of negligence, directed the jury to return a verdict for the defendant, and the judgment entered on the verdict was affirmed by the Court of Appeals of the District. (35 App. D. C. 93.) This writ of error was then prosecuted.

Without attempting to state the evidence, we think there is no room whatever for the contention that the court below erred in affirming the action of the trial court in taking the case from the jury. We say this because, adopting the view most favorable to the plaintiff of the evidence, it affords not even a shadow of ground for con-

cluding that the injury suffered was caused by the failure of the master to perform the positive duty resting on him to exercise reasonable care to provide a safe place for the work or proper appliances.

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* HENDERSON ELEVATOR COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 105. Argued December 19, 1912.—Decided January 6, 1913.

Failure to post rates does not estop the carrier from collecting the published tariff rate notwithstanding a lower rate may have been quoted to the shipper. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573.

138 Kentucky, 220, reversed.

THE facts are stated in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. Blewett Lee,* was on the brief, for plaintiff in error:

The decision below restores the evil of rebates. Its effect is to give the shipper a lower rate than other shippers who had to pay for their transportation according to the published rates. It forces the carrier to pay the shipper a rebate from the lawful rate. If the judgment below can stand, an effective way has at last been found to guarantee shippers against future changes of railroad rates, and the decision in *Armour* v. *United States,* 209 U. S. 56, approved in *Phila. &c. Co.* v. *Schubert,* 224 U. S. 603, 615, becomes a dead letter. *Texas & Pacific Ry. Co.* v. *Mugg,* 202 U. S. 242, controls this case.

Posting the tariff was not essential. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 594; *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449; *United States* v. *Miller*, 223 U. S. 599.

The meaning of the statute has been made clear by subsequent legislation. *United States* v. *Freeman*, 3 How. 556, 564; *Cope* v. *Cope*, 137 U. S. 682, 688; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309.

When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.

See act of June 18, 1910, 36 Stat. 548, providing for penalty on the carrier in case of misstatement of rate, which covers the contingency of a shipper's entering into a sale or other contract whereby the obligation arises to ship the freight at his cost. The evident intent of the act is that there shall be no other remedy. It is also a legislative construction of the act that previously no action would lie under the circumstances for which this remedy is provided. For legislative history of that act, see Sen. Bill, 6737, House Bill, No. 17,536, House Report, No. 923, 61st Congress, 2d Sess., p. 9; Sen. Report, 355, part two, 61st Congress, 2d Sess., p. 24; Cong. Rec., March 18, 1910, p. 3372; April 12, 1910, p. 4588; April 18, 1910, pp. 4937–4940; April 19, 1910, p. 5020; May 3, 1910, p. 5749; June 1, 1910, p. 7206; June 7, 1910, pp. 7569, 7570; June 14, 1910, p. 8134.

For construction of the rule adopted by the Interstate Commerce Commission, see *Poor Grain Co.* v. *C., B. & Q. Ry. Co.*, 12 I. C. C. Rep. 418, 421, 423.

The court should adopt the ruling of the Commission charged with the construction of the act. *United States* v. *Alexander*, 12 Wall. 177, 180; *N. Y., N. H. & H. R. R. Co.* v. *Int. Com. Commn.*, 200 U. S. 361.

For construction of the rule in the state courts, see *Louisiana Nav. Co.* v. *Holly*, 127 La. Rep. 615; *Schenberger* v. *Union Pac. R. Co.*, 84 Kansas, 79, citing *Gulf, Col. &c. Ry.* v. *Hefley*, 158 U. S. 98; *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour Packing Co.* v. *United States*, 209 U. S. 56, and see *Atchison, T. & S. F. Ry. Co.*, v. *Bell*, 120 Pac. Rep. 987.

Decisions similar to those from which we have quoted under the Interstate Commerce Act have also been made in the construction of state laws imposing similar requirements. *Haurigan* v. *C. & N. W. R. R.*, 80 Nebraska, 132; *Savannah &c. Co.* v. *Bundich*, 94 Georgia, 775; 22 Harvard Law Rev., p. 58.

M. P. Ry. v. *Crowell &c. Co.*, 51 Nebraska, 293, distinguished.

For the present rule in Kentucky, see *Ches. & Ohio Ry. Co.* v. *Mayesville Brick Co.*, 132 Kentucky, 643; *C. & O. Ry. Co.* v. *Morton*, 143 Kentucky, 201; *Lou. & Nash. R. R.* v. *Coquillard &c. Co.*, 147 Kentucky, 530.

The state court had no jurisdiction of a suit by a shipper to recover back a sum, the collection of which it claimed was a violation of the act of Congress. Only the Commission and the Federal courts would have jurisdiction. *T. & P. Ry.* v. *Abilene &c. Co.*, 204 U. S. 426; *Southern Ry.* v. *Tift*, 206 U. S. 428; *Van Patten* v. *C., M. & St. P. R. Co.*, 74 Fed. Rep. 981, 982; *Sheldon* v. *Wabash R. Co.*, 105 Fed. Rep. 785, and see also *Robinson* v. *Balt. & Ohio R. R. Co.*, 222 U. S. 506.

There was no duty to post these rates at Henderson, Kentucky. The rates are required to be posted or filed only at points of origin, or, probably, at points of destination also. *N. Y. Bd. of Trade* v. *P. R. R. Co.*, 3 I. C. C. Rep. 417, 442; *N. O. Cotton Exch.* v. *L., N. O. & T. R. Co.*, 3 *Ibid.* 523, 525.

Mr. James W. Clay, *Mr. J. F. Clay* and *Mr. A. Y. Clay* for defendant in error, submitted:

According to every principle of the common law applicable to such cases, upon every rule of negligence and liability therefor, upon every rule of human reason and common justice,—the shipper under the facts of this case is entitled to recover, and no court, having jurisdiction of the parties and of the subject-matter, will undertake to deprive it of that right, unless compelled to do so by some mandatory provision of a constitutional statute.

There is nothing in the Commerce Act that deprives the shipper of its right to recover in this case; and no court, Federal or state, whose decisions could be regarded even as authority by this court, has ever held that under the facts established by the evidence in this case, the party injured was without remedy, or could not recover.

The ten cent rate prescribed under the schedule of 1906, was established in the manner and form required by law, and it stands as the rule until superseded by a schedule published, filed and posted in the manner and form required by law.

The filing of a tariff in the office of the Secretary of the Interstate Commerce Commission does not establish the rate. Frequently tariffs are filed in the office of the Interstate Commerce Commission which never become effective, or which are withdrawn, or repealed, or superseded before they do become effective.

When the shipper does everything one could be expected to do, and then suffers a loss by reason of the negligent failure of the railroad company to comply with the mandatory provisions of a statute,—no court has ever held that the railroad company is not liable and the shipper without remedy.

The cases cited by counsel as sustaining a contrary view as matter of fact bear out the above statement.

If the carrier in this case had filed the schedule of

April 1, 1907, in its office at Henderson, or published it as contemplated by the act, with the unusual precaution taken by the shipper as here shown, it would have been found and the loss complained of would never have occurred.

In this case after making a contract to pay freight, the shipper is notified,—not that in thirty days the rate will be increased,—but that this increase was made five or six months before, has been effective that long, and is now in full force and effect. What could the shipper do? He is deprived of the usual thirty days in which he might carry out his contract. He cannot obtain relief from the purchaser. It is too late to appeal to the Interstate Commerce Commission, because the rate has already gone into effect. There is absolutely no way to protect himself, and without any fault on his part, but through the sole fault of the carrier, he must suffer a loss, in this case of $1,960 unless the courts make that loss fall on the carrier, where it belongs under the facts of this case.

Neither the shipper nor the agent could have had any knowledge of any other tariff than the one establishing the ten cent rate, because no other tariff had been published or filed and notice of no other tariff had been given.

It is also argued that the tariff in question was not required to be filed at Henderson, and that such tariffs are only required to be posted or filed at points of origin. The carrier however is required to publish and file its tariffs at every station which is directly or indirectly affected by it. *Re Passenger Tariffs*, 2 I. C. C. Rep. 445; *N. O. Cotton Exchange* v. *Railroad*, 3 I. C. C. Rep. 525; *Railroad Co.* v. *Hefley*, 158 U. S. 98; *Armour* v. *United States*, 209 U. S. 56.

The act provides that where a suit is brought involving a question of unreasonableness of rate, or a question of discrimination in rates, the Interstate Commerce Commission and the Federal courts have jurisdiction. This

action, however, is upon neither of these grounds. This is a case, as we have shown, based upon the common-law right to recover damages for the negligent act of another. The state court is bound by the Federal statute, but it has the same right to construe it that the Federal courts have.

The jurisdiction of the state courts of cases arising under the laws of the United States is concurrent with that of the Federal courts, save and except where such jurisdiction is expressly prohibited. Federalist, No. 82; *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 515; Section 711 of the Rev. Stat.; *West. Un. Tel. Co.* v. *Call Publishing Co.*, 181 U. S. 92; *Galveston &c. R. Co.* v. *Wallace*, 223 U. S. 481.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White.

The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the Railroad Company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of the Railroad Company of the freight rate on corn shipped in interstate commerce from the station of the Railroad Company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact the rate as fixed by the published tariff on file with the Interstate Commerce Commission and effective at the time was 13½ cents per hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff "was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff com-

plains, . . ." there should be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Kentucky, 220), this writ of error was sued out.

It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this court interpreting and applying the Act to Regulate Commerce. *New York Cent. R. R.* v. *United States* (No. 2), 212 U. S. 500, 504; *Texas & Pacific R. R. Co.* v. *Mugg*, 202 U. S. 242; *Gulf Railroad Co.* v. *Hefley*, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. *Kansas City So. Ry. Co.* v. *Albers Comm. Co.*, 223 U. S. 573, 594 (a).

Reversed.

PRESTON v. CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 195. Submitted December 16, 1912.—Decided January 6, 1913.

Whether a state officer is within the classified service and not subject to removal under the Civil Service Act of the State is a matter for the state court to determine, and its ruling is binding upon this court and presents no Federal question. *Taylor* v. *Beckham*, 178 U. S. 548.

Where the judgment of the state court rests upon non-Federal questions sufficient to support it, such as laches and long delay, this court cannot review the judgment upon the ground that a Federal question also exists. *Moran* v. *Horsky*, 178 U. S. 205.

In a proceeding specifically for mandamus to restore petitioner to a state office over which this court has no jurisdiction, it cannot con-

sider any rights which petitioner may have in a fund of which he may be deprived without due process of law, and the judgment dismissing for want of jurisdiction does not conclude his rights in that respect.
Writ of error to review 246 Illinois, 26, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court by writ of error, are stated in the opinion.

Mr. John W. Beckwith and *Mr. W. H. Sexton* for the defendants in error, in support of motion to dismiss or affirm:

If the decision of the state court is upon grounds broad enough to support the judgment independent of any Federal question, there is no Federal issue involved in the case so as to give this court jurisdiction and it will not entertain a writ of error. *Rutland Railroad Co.* v. *Central Vermont R. R. Co.*, 159 U. S. 630; *Moran* v. *Horsky*, 178 U. S. 205; *Pittsburgh Iron Co.* v. *Cleveland Iron Min. Co.*, 178 U. S. 270; *Marrow* v. *Brinkley*, 129 U. S. 178; *Castillo* v. *McConnico*, 168 U. S. 674; *Klinger* v. *Missouri*, 13 Wall. 263; *Capital National Bank* v. *Cadiz Nat. Bank*, 172 U. S. 425; *Harrison* v. *Morton*, 171 U. S. 38; *Pierce* v. *Somerset R. Co.*, 171 U. S. 641; *Wade* v. *Lawder*, 165 U. S. 624; *Bacon* v. *Texas*, 163 U. S. 207; *Seneca Nation* v. *Christy*, 162 U. S. 283; *Gillis* v. *Stinchfield*, 159 U. S. 658.

Plaintiff in error has no property rights in the emoluments of the position or office of police patrolman, and, therefore, has suffered no deprivation thereof in violation of the Federal constitutional guaranties. *People* v. *Kipley*, 171 Illinois, 44, 71; *Donahue* v. *County of Will*, 100 Illinois, 94; *State* v. *Hawkins*, 44 Oh. St. 98.

Nor is plaintiff in error deprived of his property without due process through being rendered ineligible for a police pension by the city's action, since there is no property right in a pension, which is merely a largess or gratuity.

Morgan v. *People*, 216 Illinois, 437, 449; *Walton* v. *Cotton*, 19 How. 355; *Frisbie* v. *United States*, 157 U. S. 160; 26 Am. & Eng. Ency. of Law (2d ed.), 658.

Mr. Allen B. Chilcoat and *Mr. Stephen A. Day* for the plaintiff in error, in opposition thereto:

A motion to dismiss will be denied where a claim of Federal right under the Constitution of the United States has been specially set up and denied by the decision of the state court, whether such question appears to have been expressly passed upon or must have been denied by the state court in reaching its conclusion. *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 30; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254; *Detroit &c. Ry.* v. *Osborn*, 189 U. S. 383; *Schlemmer* v. *Buffalo, Roch. & P. Ry.*, 205 U. S. 1, 11; *T. H. & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579; *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 697; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *Bohanan* v. *Nebraska*, 118 U. S. 231; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506, 519.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White.

Upon the assertion that he had been wrongfully dropped "from the pay roll of the policemen of the City of Chicago," plaintiff in error commenced proceedings in *mandamus* in the state court to compel the placing of his name upon the said pay rolls to the end that he might thereafter draw the pay alleged to be due him as a police patrolman "as the other police patrolmen in said city of Chicago are paid." This writ of error is prosecuted to a judgment of the Supreme Court of Illinois (246 Illinois, 26), affirming a judgment sustaining a demurrer to the petition in *mandamus* and denying the writ.

Among other contentions made by the plaintiff in error

and passed upon by the Supreme Court of Illinois was one to the effect that he had become an officer of the classified service and entitled to the protection against removal conferred by an act styled the Civil Service Act and that hence his removal from office without written charges preferred against him and without notice and an opportunity to be heard amounted to a denial of due process of law within the purview of the state constitution and of the Fourteenth Amendment to the Constitution of the United States. But the court below held these claims not maintainable on the ground that upon a proper construction of the state statutes the petitioner was not in the classified service and was subject to removal. This ruling is binding upon us and presents no Federal question. *Taylor* v. *Beckham*, 178 U. S. 548. Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question. *Moran* v. *Horsky*, 178 U. S. 205, 207.

It is strenuously insisted in argument that the plaintiff in error was entitled to participate in a police pension fund to which he had contributed from his wages for a long period of time, and therefore to remove him was additionally to deprive him of property without due process of law, in violation of the Fourteenth Amendment. But the specific relief prayed was a writ of *mandamus* to restore plaintiff in error to the pay rolls as a policeman. What if any rights in the pension fund referred to were protected by the Constitution of the United States we therefore may not here consider, and that question from a Federal point of view is not concluded by the judgment dismissing the writ of error which we shall enter.

Writ of error dismissed.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GERSCH, *v.* CITY OF CHICAGO ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 474. Submitted December 16, 1912.—Decided January 6, 1913.

Where the record does not contain the final judgment to which the writ of error is directed this court cannot assume that a judgment was entered and is without authority to exert jurisdiction.

THE facts are stated in the opinion.

Mr. John W. Beckwith and *Mr. W. H. Sexton*, for the defendants in error, in support of motion to dismiss or affirm.

Mr. Allen B. Chilcoat and *Mr. Stephen A. Day*, for the plaintiff in error, in opposition thereto.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

This is a companion case to *Preston* v. *City of Chicago*, No. 195, just disposed of. Unlike the record in the Preston case, however, the record in this case does not contain the final judgment to which the writ of error is directed. As we cannot assume that a judgment was in fact entered in the Supreme Court of Illinois, it results that we are without authority to exert jurisdiction.

Writ of error dismissed.

UBEDA *v.* ZIALCITA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 77. Submitted December 6, 1912.—Decided January 6, 1913.

One, whose registered trade-mark is manifestly an imitation of an earlier but unregistered trade-mark, cannot restrain a third party from using it.

The Philippine Trade-mark Act expressly denies the right of one fraudulently using a trade-mark to recover.

Section 13 of the Treaty with Spain of 1898, protecting industrial property in the ceded territory, will not be construed as contravening principles of morality and fairness and as protecting a trade-mark fraudulently registered prior to the treaty.

A statute which introduces no new rule is not retrospective.

Even if a trade-mark be not registered, if it be well known, it is an imposition on the public to use an imitation of it.

Even if a statute makes a certificate of trade-mark conclusive, it must be taken subject to the general principle of law embodied in the statute to the effect that trade-marks fraudulently adopted are not protected.

Where it does not clearly appear to the contrary, this court will assume that the same principles of honesty and fairness prevail in Spain as in our own law.

13 Phil. Rep. 11, affirmed.

THE facts, which involve the right to use a trade-mark in the Philippine Islands, are stated in the opinion.

Mr. A. B. Browne, Mr. Alexander Britton, Mr. Evans Browne and *Mr. W. A. Kincaid* for appellant.

No appearance for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff and appellant is a manufacturer of gin and sues to restrain the use of a trade-mark like his own

and to recover double damages. The trade-mark consists of two concentric circles having the words Ginebra de Tres Campanas and the plaintiff's name between them, and in the centre a device of three bells (Tres Campanas) connected at the top by a ribbon and some ears of grain, with the words Extra Superior under the mouth of the bells. The plaintiff's autograph is reproduced across the middle of the circular space and the bells. More detail is unnecessary; but it may be mentioned that the plaintiff claims title under a grant from the Governor General dated December 16, 1898, and that the mark covered by the alleged grant had underneath the circles the word Amberes (Antwerp), indicating imported gin, while that now used has Manila in the same place and is applied to gin made in the Philippines.

It may be assumed that the defendant's design has a deceptive resemblance to the plaintiff's notwithstanding a change from Tres Campanas to Dos Campanas and the substitution of the defendant's autograph for the plaintiff's. And whether the plaintiff has a title to the mark now used or not it also may be assumed that he might recover under the Philippine act of March 6, 1903, No. 166, § 4; Compiled Acts, p. 180, § 58, but for the following facts, on which the defendant had judgment in both courts below.

The plaintiff's trade-mark in its turn closely imitates in most particulars a much earlier and widely known trade-mark of Van Den Bergh & Co., of Antwerp. It is true that in the latter there is but one bell, and that the title correspondingly is Ginebra de la Campana, but the intent to get the benefit of the Van Den Bergh device is too obvious to be doubted. We do not go into the particulars of the different registrations, &c., of this latter, beginning with a Spanish certificate to the Antwerp firm in 1873. For although the plaintiff elaborately argues that under the Spanish regime trade-mark rights could be

acquired only by statutory registered grant; that Van Den Bergh & Co. never acquired any such rights in the Philippines; that if they did they lost them by failing to register or lapse of time, and that he was free to get a registered title as against any certificate of theirs; those questions are immaterial in this case. With or without right the earlier trade-mark was in widespread use and well known, and the obvious intent and necessary effect of imitating it was to steal some of the good will attaching to it and to defraud the public. The courts below found the fraud and that both plaintiff's and defendant's marks were nothing more than variations upon the earlier mark.

In such a case the Philippine act denies the plaintiff's right to recover. Act No. 666, § 9. See § 12, and No. 744, § 4. Compiled Acts, §§ 63, 66. It is said that to apply the rule there laid down would be giving a retrospective effect to § 9 as against the alleged Spanish grant of December 16, 1898, to the plaintiff, contrary to general principles of interpretation and to Article 13 of the Treaty of Paris, April 11, 1899, providing that the rights of property secured by copyrights and patents shall continue to be respected. But the treaty, if applicable, cannot be supposed to have been intended to contravene the principle of § 9, which only codifies common morality and fairness. The section is not retrospective in any sense, for it introduces no new rule. See *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. Imposition on the public is not a ground on which the plaintiff can come into court, but it is a very good ground for keeping him out of it. Even if Van Den Bergh & Co. had no registered title and no such other rights under Spanish colonial law as they have under Act No. 666, § 4, the imposition on the public was still there and though not a matter of which the defendant could complain, it was a matter to which he could refer when the plaintiff sought to exclude him from doing just what the plaintiff had done himself. This

certainly would have been our law, and we should assume, if material, that the same doctrine would have prevailed in Spain, in the absence of the clearest proof to the contrary, which we do not find in the record or the brief.

What we have said with reference to the plaintiff's claim under the Treaty applies in substance to his argument that by § 14 of Act No. 166 the Spanish certificate is conclusive evidence of the plaintiff's title. That section must be taken to be subject to general principles of law embodied in other sections to which we have referred.

If there was any claim intended to be put forward on the ground of unfair competition, the prayers of the complaint and the plaintiff's testimony show that such claim depended fundamentally on the alleged infringement of trade-mark. Any matters of fact in dispute were sufficiently disposed of by the concurrent findings of the courts below.

Judgment affirmed.

PITTSBURG STEEL COMPANY *v.* BALTIMORE EQUITABLE SOCIETY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 103. Argued December 18, 19, 1912.—Decided January 6, 1913.

A state statute changing a remedy for enforcing contract rights does not impair the contract if it gives a more efficacious remedy than existed before or does not impair it so materially as to affect the creditor's rights.

Where, as in this case, this court cannot say that the state court was wrong in holding the new remedy under a state statute to be more efficacious than the former remedy for enforcing claims of creditors

of a corporation against the stockholders, it will not declare the statute unconstitutional. And so *held* as to Chap. 305, Laws of Maryland of 1908.

One not hurt by a provision of an act cannot raise the question of its constitutionality on that ground.

113 Maryland, 77, affirmed.

THE facts, which involve the constitutionality of a statute of Maryland providing remedy for enforcing the liability of stockholders of corporations, are stated in the opinion.

Mr. Edgar Allan Poe, with whom *Mr. J. Kemp Bartlett*, *Mr. L. B. Keene Claggett* and *Mr. R. Howard Bland* were on the brief, for plaintiff in error:

Chapter 305 of the Acts of the General Assembly of Maryland of 1908, especially paragraph 64A thereof, impaired the obligation of the contract existing between the plaintiff in error and the defendant in error on the sixth day of April, 1908, the date when said act became effective, and is therefore unconstitutional, being in contravention of § 10 of Article I of the Constitution of the United States.

Prior to the passage of Chapter 305, a creditor of a Maryland corporation had the choice of two remedies against a stockholder whose subscription was unpaid in whole or in part; he could either proceed at law, as the plaintiff in error did in this case, or he could proceed by bill in equity in the nature of a creditor's bill. *Steel Company* v. *Equitable Society*, 113 Maryland, 81; *Mathews* v. *Albert*, 24 Maryland, 527; *Norris* v. *Johnson*, 34 Maryland, 485.

It is not a case of the substitution of one remedy for another, but of the entire elimination of the more valuable of one of two remedies.

This same act was upheld in *Republic Iron Co.* v. *Carlton*, 189 Fed. Rep. 126, but a practically similar act of

1904 was stricken down as unconstitutional in *Myers* v. *Knickerbocker Trust Co.*, 139 Fed. Rep. 111.

Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. *McCracken* v. *Hayward*, 2 How. 608 at 611; *Seibert* v. *Lewis*, 122 U. S. 284, 294.

Whatever legislation lessens the efficacy of a remedy impairs the obligation. *Louisiana* v. *New Orleans*, 102 U. S. 203, 206; *Bryan* v. *Virginia*, 135 U. S. 685, 693; *Edwards* v. *Kearzey*, 96 U. S. 595; *Rees* v. *City of Watertown*, 19 Wall. 107; *Dexter* v. *Edmonds*, 89 Fed. Rep. 467, 469; *Western Nat. Bank* v. *Reckless*, 96 Fed. Rep. 70.

Chapter 305 actually postpones and retards the enforcement of the contract, materially abridges the remedy for enforcing it, and fails to supply an alternative remedy equally adequate and efficacious.

The latter part of § 64A of Chapter 305, actually reduces the period of limitation as against all creditors who had brought suit against stockholders between the first day of July, 1907, and the sixth day of April, 1908. This provision is unconstitutional and vitiates the entire section.

Mr. Wilton Snowden, Jr., and *Mr. Vernon Cook* for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the plaintiff in error as a creditor of the South Baltimore Steel Car and Foundry Company to recover its claim from the defendant, a holder of stock in that company the subscription for which had not been fully paid. The action was begun on February 26, 1908, and at that date it could be maintained. But in April a statute was enacted (Act of April 6, 1908, c. 305,

Laws 1908, p. 58), making the stockholder's liability assets of the corporation, saving the rights of creditors at the date of the act, but providing that the exclusive remedy for such rights as against Maryland stockholders should be by bill in equity on behalf of such creditors as might come in. This provision was made operative as of July 1, 1907, and was to cause all actions at law of this kind brought since then to abate, saving the right to become party to a bill. On this statute the defendant moved to dismiss the suit. The motion was granted and the judgment was affirmed by the Court of Appeals, which sustained the constitutionality of the act as so applied. 113 Maryland, 77.

Of course the objection is that the law impairs the obligation of the plaintiff's contract. If the stockholder's liability were purely local and no more than matter of remedy for the collection of the principal debt, still this objection would have to be considered. See *Hawthorne* v. *Calef*, 2 Wall. 10. *Brown* v. *Eastern Slate Co.*, 134 Massachusetts, 590, 592. But the case was argued on the footing of a contract between the creditor and the stockholder, and as the statute seems to assume that the stockholder's liability may follow him into other jurisdictions and the Court of Appeals affirmed that a contract between the parties is presumed, we in turn assume that view to be correct. *Bernheimer* v. *Converse*, 206 U. S. 516, 529. In either view the question put in the form most favorable for the plaintiff is the same; whether the remedy against the defendant is impaired so materially as to affect the plaintiff's rights. *McGahey* v. *Virginia*, 135 U. S. 662, 693.

The plaintiff's supposed contract was subject to peculiar infirmities. His right was shared equally by all other creditors of the corporation, and not only might some other creditor by diligence have got in ahead of the plaintiff and have exhausted the fund for which the defendant could be held, but the right depended on the stockholder's

will. As was observed by Judge Rose, following the Maryland cases, in *Republic Iron & Steel Co.* v. *Carlton*, 189 Fed. Rep. 126, 137, the statute does no more than the stockholder was free to do before. He could have paid the corporation or a receiver or other creditors. The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact—of what the remedy amounted to in practice. It is admitted that bringing the action gave the plaintiff no lien, as it seems mistakenly to have been assumed to do in *Myers* v. *Knickerbocker Trust Co.*, 139 Fed. Rep. 111, 116. The Court of Appeals states that the remedy has been found in practice an uncertain one, less efficacious than that which is substituted. There is nothing to contradict their statement as to what experience has taught. With that fact before us and also the absolute dependence of the creditor upon the will of the stockholder, we cannot go into nice speculation as to the probable result of this particular case, or say that the decision was wrong. The power of the State to make similar changes of remedy is asserted in more general terms than we have employed, in *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 755. See also *Henley* v. *Myers*, 215 U. S. 373, 385.

A further objection is based upon the period of limitation established by the act. But as it does not appear that the plaintiff was hurt by it, this objection is not open. *Darnell* v. *Indiana*, *ante*, p. 390.

Judgment affirmed.

MARSHALL DENTAL MANUFACTURING COMPANY *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 104. Argued December 19, 1912.—Decided January 6, 1913.

Quære: Whether this court can go behind successive findings of the Secretary of the Interior and the state court that a lake was properly meandered and the lands within its area were not swamp. In this case no reason appears for so doing.

By the law of Iowa riparian owners take only to the water's edge and grants of the United States follow the state rule and convey no land under an unnavigable lake.

The title to the bed of a meandered lake formerly within the public domain of the United States, for which no patent has been issued, either remains in the United States or has passed under the Swamp Land Act to the State.

Under such circumstances a State has, by virtue of its sovereignty, an interest sufficient to entitle it to maintain an action against one intruding without title.

143 Iowa, 398, affirmed.

THE facts, which involve the title to a meandered lake in the State of Iowa, are stated in the opinion.

Mr. E. B. Evans for plaintiff in error.

Mr. George Cosson, Attorney General of Iowa, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition brought by the State of Iowa to enjoin the defendants from draining the waters of Goose Lake, in Greene County, Iowa. The defendant, now

plaintiff in error, set up title, on the ground that the so-called lake, a tract of several hundred acres, was swamp land and was granted to the State by the act of September 28, 1850, c. 84, 9 Stat. 520; Rev. Stats. § 2479; that it passed to Greene County by an act of the legislature of January 13, 1853, and thence by mesne conveyances to this defendant. After a trial the court of first instance entered a decree for the plaintiff, and the decree was affirmed by the Supreme Court of the State. 143 Iowa, 398.

The material facts are few. In the original survey by the Government in 1853 the lake was meandered, which meant under the instructions to surveyors then in force that it was a lake or deep pond, and no patent ever has issued from the United States. In 1903 the plaintiff in error applied to the Secretary of the Interior to have the land surveyed as swamp land, but the application was refused, on the ground that it did not appear sufficiently that there was not a lake there, as indicated, at the time of the survey. If the question of fact was open under *(Hannibal & St. Joseph) Railroad Co.* v. *Smith*, 9 Wall. 95, the state courts found that Goose Lake was an unnavigable body of water proper to be meandered, and we see no sufficient reason for going behind these successive findings, if we had power to do so. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668. See *French* v. *Fyan*, 93 U. S. 169. *McCormick* v. *Hayes*, 159 U. S. 332. It follows that the plaintiff in error shows no title. By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. *Hardin* v. *Jordan*, 140 U. S. 371. *Hardin* v. *Shedd*, 190 U. S. 508. *Whitaker* v. *McBride*, 197 U. S. 510, 512. It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the State.

The question as to the title to the bed is treated as open

in *Hardin* v. *Shedd*, 190 U. S. 508, 519, and *Whitaker* v. *McBride*, 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not. This principle has been affirmed and acted on by the court so recently that it does not require further argument here. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 356. See also *Kansas* v. *Colorado*, 206 U. S. 46, 93. *McGilvra* v. *Ross*, 215 U. S. 70, 79.

Decree affirmed.

KALANIANAOLE *v.* SMITHIES, TRUSTEE OF COCKETT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 109. Argued December 20, 1912.—Decided January 6, 1913.

On a pure matter of form as to the parties in a suit coming here from a court of a Territory, and where the whole interest in a judgment sued upon was before that court, this court should not go behind the local practice.

A joint judgment ceases to be joint by the death of one of the parties.

Where the joinder of an executor of a party whose interest has ceased is simply a mistake, it is not reversible error.

20 Hawaii, 138, affirmed.

THE facts are stated in the opinion.

Mr. C. W. Ashford, for plaintiff in error, submitted.

Mr. Ralph P. Quarles, with whom *Mr. A. L. C. Atkinson* was on the brief, for defendants in error.

Memorandum opinion by direction of the court. By MR. JUSTICE HOLMES.

This is a suit on a deficiency judgment rendered upon foreclosure of the mortgage that was under consideration in *Kawananakoa* v. *Polyblank*, 205 U. S. 349. The judgment was in favor of Polyblank, Trustee, and Cockett, sole beneficiary, against Kawananakoa and the plaintiff in error, Kalanianaole. Before the present suit was begun the trustee resigned, Smithies was duly appointed successor in the trust and the former trustee assigned the judgment to him. Smithies and his beneficiary then brought this action against the plaintiff in error and the executor of Kawananakoa who had died. The executor demurred and had judgment. The plaintiff in error then answered, setting up the discharge of the executor and that the plaintiffs allowed the claim against the latter to be barred by time before bringing suit. The case was heard upon mutual admissions of the facts set up in the declaration and answer. In argument the plaintiff in error also objects that only the original judgment creditors could sue. Both objections were sufficiently answered in the court below. That as to the plaintiffs is pure matter of form, on which we should not go behind the local practice. The whole interest in the judgment was before the court. As to the second, the judgment was sued upon as a joint judgment, but it ceased to be joint by the death of one of the parties bound, as is the nature of joint obligations. *Edsar* v. *Smart*, T. Raym. 26; Y. B. 3 ed. 3, 11, pl. 37. See 2 Vernon, 99. The joinder of the executor was simply a mistake that did no harm. See *Bierce* v. *Hutchins*, 205 U. S. 340, 347.

Judgment affirmed.

EWING *v.* CITY OF LEAVENWORTH.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 66. Argued December 6, 1912.—Decided January 6, 1913.

A license tax on express companies for receiving and sending packages to and from points within the State is not unconstitutional as an attempt to tax interstate commerce when applied to packages passing between such points by routes lying partly through another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, followed; *Hanley* v. *Kansas City Southern Railway*, 187 U. S. 617, distinguished. 80 Kansas, 58, affirmed.

THE facts, which involve the constitutionality of a license tax on express companies, are stated in the opinion.

Mr. Branch P. Kerfoot, with whom *Mr. Frank H. Platt*, *Mr. Jno. T. O'Keefe* and *Mr. George W. Field* were on the brief, for plaintiff in error:

An express company may not be compelled to buy a city license before it may handle in that city packages forwarded by it therefrom to other places in the same State, or from other places in that State thereto, which packages are necessarily partly carried through another State. Such business is interstate transportation, and the city may not prohibit or burden the transaction of such business.

The transportation of express packages between Leavenworth, Kansas, and other stations in Kansas, over railroad lines a large part of which are in Missouri, is interstate commerce. *Hanley* v. *Kansas City Southern Railway Company*, 187 U. S. 617; *Coast Steamship Co.* v. *Railroad Commissioners*, 9 Sawy. 253.

Leavenworth claims the right to license express business which the State of Kansas has no power to regulate.

Leloup v. *Mobile*, 127 U. S. 640, 645; *Lehigh Valley* v. *Pennsylvania*, 145 U. S. 192, and *Maine* v. *Grand Trunk*, 142 U. S. 217, do not apply.

Campbell v. *Chic., Mil. & St. P. Ry. Co.*, 86 Iowa, 587; *Seawell* v. *Kansas City &c. R. R. Co.*, 119 Missouri, 222; *Railroad Commissioners* v. *West. Un. Tel. Co.*, 113 Nor. Car. 213, were decided simply out of deference to *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and carry the conclusions of that case too far.

The ordinance as construed by the Supreme Court of Kansas is invalid because it requires an express company to take out a license to conduct interstate commerce. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57.

The license tax specified in the ordinance is invalid because it is a burden on interstate commerce. It is directly imposed upon the right to do the business. It is not a property tax measured by the amount of receipts. It cannot, therefore, be sustained upon the authority of those cases which hold that a State may collect a property tax based on receipts from interstate transportation. *Leloup* v. *Port of Mobile*, 127 U. S. 640.

Hanley v. *Railway*, 187 U. S. 617, 621; *United States Express* v. *Minnesota*, 223 U. S. 335, distinguished.

Mr. Benjamin F. Endres and *Mr. Arthur M. Jackson* filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court.

Plaintiff in error was the agent of the United States Express Company at Leavenworth, Kansas. He was convicted of violating an ordinance of the city imposing a tax on the business of express companies. The conviction was affirmed in 80 Kansas, 58, and the case is brought here.

Under the ordinance a tax was imposed on the business and occupation of express companies as follows:

"The sum of fifty dollars per year on the business and occupation of Express Company, corporation, or Agency, in receiving packages in this city from persons in the city and transmitting the same by express from this city within this State to persons and places within this State, and receiving in this city packages by express transmitted within the State from persons and places in this State to persons within this city and delivering the same to persons in this city excepting the receipt, transmission and delivery of any such packages to and from any department, agency or agent of the United States, and excepting the receipt, transmission and delivery of any such packages which are interstate commerce; the business and occupation of receiving, transmitting and delivering of the packages herein excepted is not taxed hereby."

The United States Express Company receives express packages at Leavenworth and forwards them by railroad to other cities and towns, some without the State and some within the State, and also delivers packages which have been forwarded to Leavenworth from like cities and towns. All such express packages are required to be brought into or sent out of Leavenworth, which lies west of the Missouri River in Kansas, over the Rock Island Railroad, which runs along the Missouri side of the Missouri River, with a branch across the river to Leavenworth. The Express Company has no other means of transportation of packages in or out of Leavenworth. It therefore follows that every package handled by the Express Company at Leavenworth is brought from or carried into the State of Missouri over this branch of the Rock Island Railroad. The actual carriage in the State of Kansas over such branch is about one mile. The record shows that about ten per cent. of the business done at Leavenworth by the Express Company is between Leaven-

worth and other points in Kansas, but all such business is required to be transported in part at least within the State of Missouri.

The contention in this case is that the tax thus imposed is a regulation of and burden upon interstate commerce, and therefore in violation of the Federal Constitution which vests in Congress the sole authority to regulate commerce among the States.

It is to be observed that the ordinance excludes interstate and Government business. As the Supreme Court of Kansas says (80 Kansas, 62): "The license tax was upon so much of the company's business as was carried on in Kansas. It had an office and local conveyances in Leavenworth for the collection of packages in that city, and it made contracts for transporting these packages to places within the state. Likewise it collected packages in other parts of the state and carried them into Leavenworth, where they were delivered to the consignees. Does the fact that in carrying these packages between points in Kansas they pass over the soil of another state for a short distance make the tax on that business invalid?"

We are of opinion that this case is controlled by *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, in which it was held that a State might tax the receipts of a railroad corporation for the portion of the transportation which was within the State, although the transportation then in question while between points within the State, passed over the railroad which traversed for a part of the way territory of an adjoining State. It was held that a tax upon such receipts did not tax interstate commerce, and this court said (p. 202):

"It should be remembered that the question does not arise as to the power of any other State than the State of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of

this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

The *Lehigh Valley Case* was cited with approval in *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 342, as determinative of the proposition that the State of Minnesota might tax the receipts of an express company from the transportation of packages from points within the State to other points therein although the transportation was in part outside the State.

It is contended, however, that the contrary result must be reached, applying the principles laid down in *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon railway transportation, the transportation in question in that case being a single carriage partly outside of the State of Arkansas from a point within to another point within the State. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the State. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing and as a subject for rate legislation was indivisible. The case of *Lehigh Valley Railroad* v. *Pennsylvania*, *supra*, was called to the attention of the court, and of that case this court said (p. 621):

"That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S.

204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the Government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the *Lehigh Valley Case* to such a situation we are of opinion that, for the purpose of a privilege tax for business thus done, the municipality, acting under authority of the State, did not exceed its just power.

Judgment affirmed.

UNITED STATES *v.* UNION PACIFIC RAILROAD COMPANY.

MOTION AS TO FORM OF MANDATE.

No. 446. Submitted December 19, 1912.—Decided January 6, 1913.

Each case under the Sherman Act must stand upon its own facts and this court will not regard the methods provided in decrees of other cases as precedents necessarily to be followed where a different situation is presented for consideration.

The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors; and this court will not approve a method of distributing stock of a railroad company held by a competitor so that the natural result will be that a majority of the governing boards of both roads shall consist of the same persons.

In this case it is not impossible under the plan proposed that this result will happen and therefore it is not approved.

The main purpose of the Sherman Anti-trust Act is to forbid combinations and conspiracies in undue restraint of interstate trade and to end them by as effectual means as the court may provide.

A court of equity dealing with an illegal combination should conserve the property interests involved, but never in such wise as to sacrifice the purpose of the statute.

Without precluding the District Court from considering all plans submitted as provided by the former opinion and the decree (*ante*, p. 61) this court now holds that a transfer of the stock of the Southern Pacific Company to the stockholders of the Union Pacific Railroad Company would not so effectually end the combination as to comply with the decree.

THE facts, which involve the method of effectually dissolving a combination found to be illegal under the Sherman Anti-trust Act, are stated in the opinion.

The Attorney General for the United States.

Mr. John C. Spooner, Mr. John G. Milburn, Mr. Maxwell Evarts and *Mr. N. H. Loomis* for appellees, Union Pacific Railroad Company and Oregon Short Line Railroad Company.

MR. JUSTICE DAY delivered the opinion of the court.

On December 2, 1912, this court handed down an opinion and remanded this case to the District Court of the United States, whence it came, with instructions to enter a decree which would provide an injunction as to voting the stock of the Southern Pacific Company acquired by the Union Pacific Railroad Company, and directed the court to further hear the parties in order to make a decree effectually concluding the operating force of the combination created by the purchase of the Southern Pacific Company's stock. The parties were given three months from the receipt of the mandate of this court by the District Court to propose plans, and it was directed that any one adopted by the court should be such as would effectually dissolve the unlawful combination.

The mandate of this court not having issued, on December 19, 1912, a motion was made in which the Attorney General of the United States and counsel for the appellees the Union Pacific Railroad Company and the Oregon Short Line Railroad Company (the latter holding the stock for the Union Pacific Company) joined in asking this court "to instruct the United States District Court for the District of Utah, by a provision incorporated in the mandate of this court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912."

In pursuance of the request thus preferred by the United States and the appellees named, it becomes necessary now to determine whether the distribution or sale pro-

posed of the Southern Pacific Company's shares will comply with the decree ordered to be entered by the former opinion of this court.

The Southern Pacific Company's stock, held by the Oregon Short Line Company for the Union Pacific Company, amounts to $126,650,000, par value, in shares of $100 each, and constitutes 46% of the Southern Pacific Company's stock, enough, as we have heretofore found, to effectually control the Southern Pacific Company. As stated by the appellees, the Union Pacific Company has outstanding $99,569,300, par value, of preferred stock and $216,646,300, par value, of common stock, all in shares of $100 each, amounting in all to $316,215,600, and also has outstanding $37,000,000 of bonds convertible into stock, and the appellees further state that its stock is distributed among over 22,000 holders.

It is contended on behalf of the appellees that the distribution of the Southern Pacific Company's stock, held, as we have stated, by the Oregon Short Line Company for the Union Pacific Company, among so many stockholders will effectually conclude the combination decreed to be ended by the former order of the court. It is insisted that such distribution will prevent the continued operation of the combination for the control of the Southern Pacific Company by a competing company, which the Union Pacific Company was found to be, and that it is authorized under the practice in respect to such decrees as settled by the previous decisions of this court in affirming the decree of the Circuit Court in *Northern Securities Co.* v. *United States*, 193 U. S. 197, and *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, and the decree of the Circuit Court in *Standard Oil Co.* v. *United States*, 221 U. S. 1.

In the *Northern Securities Company Case*, after providing for orders of injunction to prevent the continued operation of the Northern Securities Company, which

controlled the Northern Pacific Railway Company and the Great Northern Railway Company, it was provided (p. 355):

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Upon the affirmation of this decree by this court in 193 U. S. 197, the Northern Securities Company proceeded to reduce its outstanding capital stock from $395,400,000 to $3,954,000, providing for such reduction by requiring each holder to surrender to the company for retirement 99% of the shares held by him, and upon surrender by a stockholder the company assigned and transferred to him proportionate amounts of the stock of the Northern Pacific Company and Great Northern Company which had been placed with the Northern Securities Company, the holding company, for the purpose of creating the combination, which the court had held to be illegal, and this plan of distribution was approved by this court in 197 U. S. 244. In other words, the stock of the holding company was reduced and the surplus of assets created by such reduction, the stock of the Northern Pacific Company and the Great Northern Company, was distributed among the stockholders of the Northern Secu-

rities Company, thereby effectually ending the combination.

In the *Standard Oil Company Case* the majority of the stock of nineteen oil companies had been placed in the control of a holding company, the Standard Oil Company of New Jersey, with a capital stock of $100,000,000, the stock of the latter corporation being issued to the holders of the stock in the nineteen companies in exchange for their stock. This holding company was held to be a combination and conspiracy in restraint of trade and commerce, and, after awarding injunctions, it was provided:

"But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination."

It is evident in that case, as in the *Northern Securities Company Case*, that the distribution of the shares and stocks of the subsidiary companies, parties to the combination, among the shareholders of the Standard Oil Company of New Jersey, was to end the combination which had been decreed to be in violation of law, and prevent the continued control of the subsidiary companies by the holding company.

As was said in the opinion filed in this case, however, each case under the Sherman Act must stand upon its own facts, and we are unable to regard the decrees in the *Northern Securities Company Case* and the *Standard Oil Company Case* as precedents to be followed now, in view of the different situation presented for consideration.

The Southern Pacific Company's stock was mainly purchased from private parties, legatees of the Huntington estate, and it is evident that it is impossible to restore the *status quo* by the return of such stock to the persons from whom it was purchased upon such vendors refunding the purchase money.

The plan proposed in the present motion of distributing the stock among the shareholders of the Union Pacific Company or of selling it to such shareholders will in effect transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors. Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. *Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 597. In the present case the record discloses this mode of management of both the Southern Pacific Company and the Union Pacific Company, and, since 1905, as the proof shows, a majority of both executive committees consisted of the same persons and Mr. Harriman was chairman of both committees.

It is contended for the appellees, however, that, in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue the control of the Union Pacific Company over the Southern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind the object of the statute to end such combinations and the duty of

the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law. So of the privilege of sale to the stockholders in proportion to the amount of their holdings.

In considering these questions we must bear in mind not only the number of stockholders, but the character of the distribution of the stock among them. In the brief and exhibits of the appellees filed with this motion it is shown that of the 22,150 stockholders of the Union Pacific Company, 68, owning 5,000 or more shares each, hold together $139,782,700 of the stock and 300 others, owning from 1,000 to 5,000 shares each, hold together $59,020,700 of the stock, and that the two groups (comprising 368 stockholders) hold $198,803,400 or 62.8% of the stock, while the remaining stockholders (21,782) control only $117,412,200 of the stock. Many small shareholders might not wish to purchase the Southern Pacific Company's stock, and the privilege might be readily acquired from them by the larger and more active interests vested in the hands of the large stockholders, and thus again the condition forbidden be created and perpetuated.

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to

monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate.

In rejecting the plan for the transfer of the Southern Pacific Company's stock held for the Union Pacific Company, either by distribution or sale to the stockholders of the Union Pacific Company, we do not mean to preclude the District Court from considering and acting upon plans which may be submitted to it under the former opinion and decree of the court. We are of opinion, however, and now hold that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this court to be entered.

So ordered.

MR. JUSTICE VAN DEVANTER took no part in the hearing or determination of this motion.

WHEELER *v.* UNITED STATES.

SHAW *v.* UNITED STATES.

WHEELER *v.* MURCHIE, UNITED STATES MARSHAL.

SHAW *v.* SAME.

ERROR TO AND APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 658, 659, 660, 661. Submitted December 4, 1912.—Decided January 6, 1913.

An officer of a corporation is not subjected to an unreasonable search or seizure by a subpœna to produce without *ad testificandum* clause the books and papers of that corporation, nor is he subjected to self-incrimination by such subpœna and an order to produce thereunder or deprived of his liberty without due process of law by being committed for contempt for failure to comply with such order. *Wilson* v. *United States*, 221 U. S. 361.

Books of a corporation are not the private books of any of the officers and do not become so by the dissolution of the corporation and the transfer of the books to one of such officers.

THE facts, which involve the validity under the due process and search and seizure provisions of the Constitution of a *subpœna duces tecum* to an officer of a corporation to produce books and papers of the corporation, are stated in the opinion.

Mr. Nathan Matthews, *Mr. William G. Thompson* and *Mr. Romney Spring* for Wheeler and Shaw:

The orders of commitment and the imprisonment thereunder have deprived the plaintiffs in error and appellants of their liberty without due process of law.

The subpœna imposed no legal obligation on the corporation to produce the books and papers.

Even if the corporation had had any sort of existence at the time the subpœna was issued, it would have been under no legal obligation to produce the books and papers therein described.

A natural person who had neither the title nor possession of books and papers could not by any known form of procedure be put under a legal obligation to produce them. *Ballman* v. *United States*, 200 U. S. 186, 194.

The corporation having been lawfully dissolved and its charter annulled had thus ceased to be subject to the State's visitatorial powers and had no longer any special privileges, or franchises, or right to do business as a corporation. *Hale* v. *Henkel*, 201 U. S. 43, 74–75.

If the subpœna imposed no legal obligation upon the corporation to produce any books and papers, it imposed no legal obligation upon Wheeler and Shaw individually to do so.

The only obligation imposed upon Wheeler and Shaw by the serving upon them of a summons addressed to the corporation was an obligation in their official capacity depending wholly upon the existence of an obligation on the part of the corporation itself to produce the books and papers.

The summons ran directly to the corporation, and not to Wheeler and Shaw.

The service made upon Wheeler and Shaw in their official capacity as officers of the corporation was simply a method of enforcing the assumed obligation of the corporation, and not any obligation of theirs personally. *Commissioners* v. *Sellew*, 99 U. S. 624, 627.

The duty imposed upon them by the service was secondary, not primary. In such a case the obligation of the individual served is derivative and secondary, and not individual and primary. *Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Balti-*

more & Ohio R. R. v. *Int. Com. Comm.*, 221 U. S. 612, 622. And see *In re American Sugar Refining Co.*, 178 Fed. Rep. 109; *In re Bornn Hat Co.*, 184 Fed. Rep. 506, 508.

Where the summons is addressed to the corporation itself, then, independently of that constitutional right of the individual custodian, there can be no obligation on him to produce them unless it is first shown that the subpœna imposes an obligation upon the corporation itself to produce them.

The one advantage which the Government sought to secure by choosing a summons addressed to the corporation itself rather than one addressed to the individual custodian illustrates the distinction. For a corporation is not protected by the Fifth Amendment, and a natural person is. *Hale* v. *Henkel*, 201 U. S. 43; *The Bornn Hat Co.* v. *United States*, 223 U. S. 713, affirming 184 Fed. Rep. 506.

If the books and papers described in the subpœna were the private property of appellants, the court's order requiring their production before the grand jury, and the judgments of contempt based upon the disobedience of that order, violated their rights under the Fifth Amendment not to be compelled in any criminal case to be a witness against oneself, and under the Fourth Amendment to be exempt from unreasonable searches and seizures. *Boyd* v. *United States*, 116 U. S. 616; *Entick* v. *Carrington*, 19 How. State Trials, 1029; *Hillman* v. *United States*, 192 Fed. Rep. 264, 270; *Matter of Harris*, 221 U. S. 274.

The subpœna was unreasonably sweeping, and this defect was seasonably urged by Wheeler and Shaw on their own behalf.

If for this reason the subpœna was void as against the corporation, it could not be valid as against Wheeler or Shaw.

The Solicitor General and *Mr. Assistant Attorney General Harr* for the United States and the United States Marshal:

The Fifth Amendment has no application because appellants were not called as witnesses.

The immunity granted by the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself," means testimonial compulsion. 3 Wigmore on Evidence, § 2263.

A person who merely produces books and papers does not vouch for their contents, and when, as here, they are the records of a corporation and tell its story, not his, he is not even in effect made a witness against himself by being compelled to produce them.

The order to produce the books of the corporation was not an invasion of appellants' privacy within the meaning of the Fourth Amendment.

The Fourth Amendment, as construed in *Boyd* v. *United States*, 116 U. S. 616, merely protects a person against an invasion of his privacy, when such invasion will operate to incriminate him. But it is no invasion of a man's privacy to compel him to produce the books and papers of a corporation, whose acts, as above stated, are necessarily subject to investigation by the State. *Wilson* v. *United States*, 221 U. S. 374.

While the corporation may be dissolved, its records are still subject to examination for any purpose connected with the winding up of its affairs (Law of Massachusetts, 1903, chap. 437, § 52); and see the act of March 25, 1912, chap. 313, pp. 210, 232.

The possession of legal title to the corporate books and papers by appellants does not affect the character of those documents. They are none the less the records of the corporation because the legal title thereto has passed to Wheeler and Shaw as individuals. *In re Grant*, 198 Fed. Rep. 708.

Legal title is immaterial upon a subpœna to produce books or papers, because the court is entitled to them as against anyone for the time being, and the proceeding is not one to try title. The person subpœnaed cannot refuse to produce the papers sought if he has not title, and if he has title as well as possession, he is the better able to respond to the subpœna.

The rule, both at law and in equity, that a person cannot be compelled to produce books and papers to discover matters which may incriminate him, is subject to the qualification here contended for. See § 724, Rev. Stat.

The rule in equity that no man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture, is subject to an exception in respect to frauds and also where fiduciary relations exist. Adams' Equity, 8th ed., p. 4; *State* v. *Maury*, 2 Del. Ch. Rep. 141, 158; *Green* v. *Weaver*, 1 Sim. Rep. 404.

Sound public policy forbids the extension of the privilege against self-incrimination to a case involving the production of corporate records. 3 Wigmore, § 2251, p. 3102.

Mr. Justice Day delivered the opinion of the court.

These cases arise from the following facts: On April 12, 1912, the Federal grand jury in Boston was investigating whether Warren B. Wheeler and Stillman Shaw, plaintiffs in error in Nos. 658 and 659 and appellants in Nos. 660 and 661, had, by means of a certain corporation known as Wheeler & Shaw, Incorporated, or otherwise, violated § 215 of the act of Congress of March 4, 1909, 35 Stat. 1088, 1130, c. 321, making it a crime to use the mails of the United States for a scheme to defraud, which crime is punishable by fine or imprisonment or both. On the same day a *subpœna duces tecum*, without *ad testificandum* clause, was issued, summoning the corporation to appear

before the grand jury and produce all the cash books, ledgers, journals and other books of account of the company, and all copies of letters and telegrams of Wheeler & Shaw, Incorporated, whether signed or purporting to be signed by the corporation or by its president or treasurer in its behalf, for and covering the period from October 1, 1909, to January 1, 1911; all the aforesaid books and copies of letters and telegrams to be produced before the grand jurors under the penalties of law. The subpœna was served on Wheeler as treasurer, and on Shaw as president, of the corporation. They appeared before the grand jury, without any of the books or correspondence, as required in the subpœna, however; asked to be sworn for the purpose of explaining why they had not brought them, and left with the grand jurors papers containing the following statement of their reasons for the non-production of the books, etc. (the records are the same, *mutatis mutandis*, in the Wheeler case and the Shaw case):

"To the Grand Jurors of the District Court of the United States for the District of Massachusetts.

"Gentlemen: There was served upon me at 12:50 P. M. to-day, April 12, 1912, a subpœna addressed to Wheeler & Shaw, Inc., a corporation doing business at Boston, in said District, and calling upon that corporation to produce before you, presumably through me, 'all cash books, ledgers, journals, and other books of account of said Wheeler & Shaw, Inc., for and covering the period between October 1, 1909, and January 1, 1911, all copies of letters and telegrams of Wheeler & Shaw, Inc., signed or purporting to be signed by said Wheeler & Shaw, Inc., or by its president or its treasurer in behalf of said Wheeler & Shaw, Inc., during the months of October, November and December, 1909, and the entire year of 1910; all the aforesaid books, copies of letters, and telegrams to be produced

before the Grand Jurors of said District Court in the matter of an alleged violation of the laws of the United States by Warren B. Wheeler and Stillman Shaw.'

"I desire to avail myself of what I understand to be my right to state to you under oath my reasons for not producing any books, ledgers, or other papers or documents in response to said summons. My reasons are:

"First: That I have not in my possession or custody any cash books, ledgers, journals, or any of the other books or things described in said subpœna which belong to Wheeler & Shaw, Inc., or are in my possession as an officer or agent of Wheeler & Shaw, Inc. The only cash books, ledgers, journals, and other books, papers, and things to which the aforesaid description in said subpœna could apply are the personal property of myself and Stillman Shaw, and are in our personal possession, and are not in the possession of either of us as officers or agents of any corporation.

"Second: Even were the fact not as stated above, I am advised that the language of said subpœna quoted above is so broad, sweeping, and lacking in particularity as to constitute a violation of the rights of any party to whom a subpœna is addressed to be exempt from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.

"Third: Whether addressed to said corporation or to me personally, I am advised that said subpœna violates the rights secured to me by the Fifth Amendment to the Constitution of the United States not *to* be a witness against myself in any criminal case.

"I make this statement in good faith, and not intending any disrespect to the Grand Jury, or to the officers of the Government, and I venture to remind the Grand Jury that I am entitled under the laws of the United States not to have any inferences drawn against me by reason of the action I have taken in this matter. It is one thing to pro-

duce private books and papers in a proceeding where there is an opportunity to explain them and to examine and cross-examine witnesses concerning them; but the situation in an *ex parte* proceeding is so different that I feel sure the Grand Jury will feel that I am justified in standing upon my constitutional rights in this matter.

"WARREN B. WHEELER."

The grand jurors on April 13, 1912, filed in the District Court a paper called a petition for attachment for contempt, in which they prayed that Wheeler and Shaw be ordered to produce the books and copies of letters and telegrams, and upon failure or refusal be adjudged guilty of contempt. Wheeler and Shaw appeared, filed motions to dismiss, which were denied, and then filed sworn answers. The cases were heard by the district judge on the grand jurors' petitions, the answers and certain agreed facts. At the close of the hearing the court ruled that the case was governed by *Wilson* v. *United States*, 221 U. S. 361, and ordered Wheeler and Shaw to produce the books and papers described in the subpœna. Final orders were entered on April 18, 1912, adjudging them in contempt and committing them to the custody of the marshal until, by producing before the grand jury the books and copies of letters and telegrams they should cease to obstruct and impede the corporation known as Wheeler & Shaw, Incorporated, from complying with the *subpœna duces tecum* or otherwise purge themselves of their contempt.

From these judgments Wheeler and Shaw sued out writs of error, which constitute cases Nos. 658 and 659. They also filed petitions for writs of *habeas corpus* against the marshal, and from the orders denying the petitions they appealed to this court, and these cases constitute Nos. 660 and 661.

Upon the hearing the district judge made certain findings of fact, as follows:

"1. A subpœna, of which a copy with a copy of the officer's return thereon is annexed to said petition, was served upon the defendant on the twelfth day of April, A. D. 1912.

"2. The corporation mentioned in the statute of the Commonwealth of Massachusetts which took effect on March 25, 1912, being Statute 1912, Chapter 313, and therein described by the words 'Wheeler and Shaw, Inc.,' is the same corporation that is mentioned in said subpœna. [By the statute the corporation was dissolved and its charter annulled.]

"3. On the afternoon of said April 12th the defendant appeared before said Grand Jury in response to said subpœna, and thereupon the questions, of which a copy is annexed to said petition, were put to him, and answers, as stated in the copy of the same annexed to said petition, were made by him, and the written statement, of which a copy is annexed to said petition, was left by him with said Grand Jury. The defendant did not bring with him or have before said Grand Jury any of the books and copies of letters and telegrams described in said subpœna. He did, when before said Grand Jury, ask to be sworn for the purpose of stating the reasons why he had not brought with him any of said books and copies of letters and telegrams; but he was not sworn. He did not waive or intend to waive his claim of a right to be sworn before said Grand Jury for the purpose aforesaid.

"4. Some time in the month of April, 1911, said corporation Wheeler & Shaw, Inc., ceased to do business, and shortly afterwards the legal title and possession of all the books and papers of said corporation then belonging to it, including all the books and copies of letters and telegrams described in the subpœna, were lawfully transferred to the defendant and to one Stillman Shaw as tenants in common, and have ever since remained in the defendant and said Shaw. Prior to the time when said statute of

1912, Chap. 313 [dissolving the corporation], took effect, the defendant was the treasurer of said corporation, and said Shaw was the president thereof, and neither the defendant nor said Shaw has ever resigned his said office in said corporation."

Wheeler and Shaw also took bills of exceptions, in which it appears that the cases were heard upon the petitions, sworn answers and certain facts admitted by counsel in open court, which are set out and incorporated in the finding of fact appearing of record, and in which it is further made to appear that defendants at the hearing before the court repeated the claim set up by them before the grand jury that a compliance with the *subpœna duces tecum* would violate their right to be secure against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution, and their right not to be compelled to be witnesses against themselves in any criminal case under the protection of the Fifth Amendment. They also asked the court to rule that such order would violate their rights under the Massachusetts constitution. The court overruled all of the objections of defendants and held, as a matter of law, that the legal effect of dissolving the corporation and transferring to the defendants the books and copies of letters and telegrams described in the subpœna had not been to make the books and papers the private property of the defendants in such sense as to exempt them from producing such books and correspondence before the grand jury, as required by the subpœna, and that the facts of the cases brought them within the rule of this court in *Wilson* v. *United States*, *supra*.

The defendants reduce their contentions in this court to two propositions, namely:

"I. The orders of commitment and the imprisonment thereunder have deprived the plaintiffs in error and appellants [referred to in this opinion as defendants] of their liberty without due process of law.

"II. If, as is agreed, the books and papers described in the subpœna were the private property of the plaintiffs in error and appellants, then the court's order requiring their production before the grand jury, and the judgments of contempt based upon the disobedience of that order, violated the right of each plaintiff in error and appellant under the Fifth Amendment not to be compelled in any criminal case to be a witness against himself, and the right of each under the Fourth Amendment to be exempt from unreasonable searches and seizures."

The proposition that the orders of the court of commitment and imprisonment deprived defendants of their liberty without due process of law seems to be based upon the contention that the corporation was in no way obliged to obey the subpœna, and that, after its dissolution, it was not subject to any subpœna requiring the production of books and papers before the grand jury. But we do not think there is any merit in this objection. If the Government had the legal right to demand the production of the books and papers in question, with a view to the investigation of the alleged offense of Wheeler and Shaw in the proceedings before the grand jury, whether the subpœna was drawn in proper form or not or whether the corporation, in view of its dissolution, could have been compelled to comply with its requirements, in the attitude which the case has taken, is immaterial. It is apparent from the facts already recited that Wheeler and Shaw were required by the *subpœna duces tecum* to bring before the grand jury the books and papers of the corporation which had been dissolved and that they so understood the subpœna; that they were in possession of such books and papers which could be by them produced before the grand jury, and that before the order of commitment was made the defendants were allowed a full hearing in a court of competent jurisdiction. No objection was taken to the technical form of the subpœna in directing it to

the corporation and not the individuals. There is nothing to show it was so broad as to be objectionable, as was indicated of the subpœna in *Hale* v. *Henkel*, 201 U. S. 43. The defendants, in possession of the books and papers, were denying the right of the court to compel their production because of the dissolution of the corporation; because the title and possession of the books and papers had passed to the defendants individually and were their private property as tenants in common, and they had no possession or custody of the documents as officers of the corporation, and because, as against them, the compulsory production of such books and correspondence would violate their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

We think the questions of substance now presented are whether the rights of the defendants as individuals to be exempt from unreasonable search and seizure of their property and from being compelled to be witnesses against themselves would be violated by the compulsory production of the documents in question.

We are of opinion that this case is virtually ruled by *Wilson* v. *United States, supra.* In that case it was held that there was no unreasonable search or seizure where the officer of a corporation, whose guilt of an offense against the laws of the United States was under investigation, was compelled to produce books and papers of the corporation of which he was president, because as against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but the books of the corporation, which were not within the protection given to the private books and papers of an individual. We are unable to see that this case differs in principle from that one. It is true the corporation in the present case had ceased to exist, but

its books and papers were still in existence and were still impressed with the incidents attending corporate documents. Wheeler and Shaw had been officers of the corporation and the books of the company had before the dissolution been made over to them; but this did not change the essential character of the books and papers or make them any more privileged in the investigation of crime than they were before.

Wheeler and Shaw, it may be admitted, could no longer be officers of the corporation, although the record shows that they had never resigned their positions. The corporation, however, had gone out of existence, leaving its books and papers in the possession of the defendants, and, it may be conceded, for many purposes such books belonged to them, but, as was held in the *Wilson Case*, the privilege of the Constitution against unreasonable searches and seizure does not protect against the lawful examination in due course of books of this character; nor does the privilege of individuals against self-incrimination in the production of their own books and papers prevent the compulsory production of the books of a corporation with which they happen to be or have been associated. It was the character of the books and papers as corporate records and documents which justified the court in ordering their production, as this court ruled in the *Wilson Case*. We think the character of the books was not changed for this purpose, because the corporation had gone out of existence after making over the books to the defendants. Such books and papers still remained subject to inspection and investigation, and no constitutional right of the defendants was violated when, being found in possession of the documents, they were required to produce them for inspection by the grand jury. It follows that the judgments of commitment in Nos. 658 and 659 and the orders appealed from in Nos. 660 and 661 should be

affirmed.

ADAMS EXPRESS COMPANY *v.* CRONINGER.

ERROR TO THE CIRCUIT COURT OF KENTON COUNTY, STATE OF KENTUCKY.

No. 18. Argued March 13, 1912; reargued October 23, 1912.—Decided January 6, 1913.

The constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between shipper and carrier of shipments in such commerce in regard to liability for loss or damage to articles carried.

Until Congress has legislated upon that subject, the liability of a carrier, although engaged in interstate commerce, for loss or damage to property carried, may be regulated by law of the State.

Since the decisions of this court in *Chicago, Milwaukee & St. Paul Railway* v. *Solan*, 169 U. S. 133, and *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, Congress has by § 20 of the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Carmack amendment, legislated directly upon the carrier's liability for loss of and damage to interstate shipments, and this legislation supersedes all regulations and policies of a particular State upon the same subject.

Only the silence of Congress authorizes the exercise of the police power of the State upon the subject of contracts with carriers for interstate shipments, and when Congress exercises its authority the regulating power of the State is at an end.

In enacting the Carmack amendment it is evident that Congress intended to adopt a uniform rule as to the liability imposed upon interstate carriers by state regulations of bills of lading and to relieve such contracts from the diverse regulation to which they had theretofore been subject.

A *proviso* reserving certain rights of action will not be construed as nullifying the statute itself and maintaining the existing confusion which it was the purpose of Congress to put an end to; and so *held* that the *proviso* in the Carmack amendment related to remedies under existing Federal law at the time of this action and not to any state law.

A rational interpretation will be given to a statute and a *proviso* and not one by which the statute will, through the *proviso*, destroy itself.

A common carrier cannot exempt himself from liability for his own

negligence or that of his employés, but the rigor of this rule may be modified by a fair, reasonable and just agreement with the shipper which does not include exemption from such negligence; and the right to receive compensation commensurate with the risk involves the right to agree upon rates proportionate with the value of the property transported.

An interstate carrier may, by a fair, open and reasonable agreement, limit the amount recoverable by the shipper to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of risk.

A limitation of liability based upon an agreed value to obtain a lower rate does not conflict with any sound principle of public policy; and it is not conformable to plain principles of justice that a shipper may understate value in order to reduce the rate and then recover a larger value in case of loss.

The provisions of the Carmack amendment are not violated by a plain provision in a bill of lading basing the charges on value of article transported and charging higher rates for increasing liability as value is declared; and so *held* as to express rates filed with the Interstate Commerce Commission.

THIS was an action in the Circuit Court of Kenton County, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon the Circuit Court gave judgment for the sum of $137.52, being the full value of the ring and interest. A writ of error was sued out from this court to the Circuit Court of Kenton County, that being the highest court of the State in which a decision could be had.

The answer and accompanying exhibit were in substance as follows:

That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906; that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars. It is then alleged that the package so delivered was sealed and that defendant did not know the contents or value, and that if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

Mr. Lawrence Maxwell, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiff in error:

The judgment of the state court denies effect to the general purpose and to specific provisions of the Interstate Commerce Acts, and deprives defendant of rights secured thereby. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361, 395; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242; *Louisville &c. Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467; *Union Pacific Ry. Co.* v. *Goodridge*, 149 U. S. 690; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Company*, 215 U. S. 481; *Melody* v. *Great Northern Ry. Co.*, 25 S. Dak. 606.

A public policy of the United States of uniform application is necessarily established by the acts to regulate commerce, which is inconsistent with the power formerly existing in the States to compel an interstate carrier to answer for more than the amount on which the rate was based to a shipper who has secured an illegally low rate.

Initial carriers are not subject to the liability imposed by varying state laws for loss or damage to interstate shipments, because Congress has assumed possession of the domain of such liability under the Carmack amendment of June 29, 1906.

Pennsylvania Railroad Co. v. *Hughes*, 191 U. S. 477, was affirmed on authority of *Chi., Mil. &c. Ry. Co.* v. *Solan*, 169 U. S. 133, but numerous changes have been made in the Interstate Commerce Act since then as both the Elkins Act and the Carmack amendment are subsequent to the transactions involved in those cases.

The main purpose of the Carmack amendment was to give the holder of the bill of lading, which the carrier to whom the goods were delivered for transportation is required to issue, a right of action against such carrier for loss caused by connecting carriers, with a right in

the initial carrier to recover over against the connecting carrier. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

The right thus created was not a right unknown to existing law. *Mo., Kas. &c. Tex. Ry. Co.* v. *McCann*, 174 U. S. 580; *Southern Pacific Ry. Co.* v. *Crenshaw*, 63 S. E. Rep. 685.

State action is inhibited when Congress has spoken. *Northern Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444.

The proviso cannot be construed so as to leave in existence rights of action under state law which apply to the same subject-matter, for to admit that the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself. *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Southern Pacific Co.* v. *Crenshaw*, 63 S. E. Rep. 865.

Defendant's liability under § 20 of the Interstate Commerce Act does not exceed fifty dollars, and the judgment of the state court for more than that amount deprives defendant of a Federal right. *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, 486; *Hart* v. *Penn. R. R. Co.*, 112 U. S. 331.

At common law, while the right of the carrier to inquire as to the value of a package in order to determine his freight was always recognized, it was held in the absence of such inquiry, that the shipper was under no obligation to disclose the value. But as early as 11 Geo. IV, and 1 Wm. IV, c. 68, it was provided by statute in England that a carrier should not be liable beyond ten pounds unless at the time of making the shipment, the shipper, if the goods were of greater value, should so declare to the carrier, and pay accordingly. And see *Gibbon* v. *Paynton*, 4 Burr. 2298 (1769); *Clay* v. *Willan*, 1 H. Bl. 298 (1789); *Izett* v. *Mountain*, 4 East, 371 (1803); *Batson* v. *Donovan*, 4 B. & Ald.

21 (1820); *Hinton* v. *Dibbin*, 2 Ad. & E. (N. S.) 646; *Kidd* v. *Greenwich Ins. Co.*, 35 Fed. Rep. 351; *Calderon* v. *Atlas S. S. Co.*, 64 Fed. Rep. 874; *Calderon* v. *Atlas S. S. Co.*, 69 Fed. Rep. 574; *The Kensington*, 88 Fed. Rep. 331; *Jennings* v. *Smith*, 106 Fed. Rep. 139; *Saunders* v. *Southern Ry.*, 128 Fed. Rep. 15; *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982; *Missouri &c. Ry. of Texas* v. *Patrick*, 144 Fed. Rep. 632; *Taylor* v. *Weir*, 162 Fed. Rep. 585; *Blackwell* v. *Southern Pac. Co.*, 184 Fed. Rep. 489; *Pierce* Co. v. *Wells Fargo Co.*, 189 Fed. Rep. 561; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272; *The Kensington*, 183 U. S. 263; *Alair* v. *Railroad Company*, 53 Minnesota, 160; *Douglas Co.* v. *Railway Co.*, 62 Minnesota, 288; *O'Malley* v. *Railway Co.*, 86 Minnesota, 380; *Loeser* v. *Chicago, M. & St. P. Ry. Co.*, 94 Wisconsin, 571; *Ullman* v. *Chicago &c. Ry. Co.*, 112 Wisconsin, 150; *Baltimore & Ohio Ry. Co.* v. *Hubbard*, 72 Oh. St. 302.

See also, for cases under the Carmack amendment, *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254; *Greenwald* v. *Barrett*, 199 N. Y. 170; *Travis* v. *Wells, Fargo & Co.*, 79 N. J. L. 83; *P. C. C. & St. L. Ry. Co.* v. *Mitchell*, 91 N. E. Rep. 735; *Larsen* v. *Oregon Short Line*, 110 Pac. Rep. 983.

Plaintiff cannot maintain the action because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by acts of Congress.

Not only does the judgment of the Kentucky court render nugatory the general purposes of the Interstate Commerce Acts, but it was based on a transaction expressly prohibited and made a misdemeanor by § 10 of the act, and by the Elkins Act. *Armour Packing Company* v. *United States*, 209 U. S. 66, 69.

A transaction which constitutes a violation of these sections cannot be the basis of an action. *Ellison* v.

Adams Express Co., 245 Illinois, 410; *Matter of Released Rates*, 13 I. C. C. Rep. 550. And see Conference Rulings of the Commission, Bulletin No. 5, April 1, 1911; *Frank* v. *Adams Express Co.*, Pitts. Leg. Jour., May 20, 1908, O. S. Vol. LV, N. S. XXXVIII (Common Pleas Court No. 1, Allegheny County).

Mr. John Randolph Schindel, with whom *Mr. Morison R. Waite* was on the brief, for defendant in error:

The contract embodied in the receipt was void under § 196 of the Kentucky constitution which provides that no common carrier shall be permitted to contract for relief from its common-law liability. *Southern Express Co.* v. *Fox*, 131 Kentucky, 257; *Adams Express Co.* v. *Walker*, 119 Kentucky, 121; *Louisville & N. R. Co.* v. *Frazee*, 24 Ky. L. Rep. 1273; *Ohio & M. R. Co.* v. *Tabor*, 98 Kentucky, 503; *Cincinnati, N. O. & T. P. R. Co.* v. *Graves*, 21 Ky. L. Rep. 684; *Illinois C. R. Co.* v. *Radford*, 23 Ky. L. Rep. 886.

The judgment of the state court did not deprive the defendant of any right, privilege, or immunity secured by the Interstate Commerce Act.

Section 196 of the Kentucky constitution deals with the right of a common carrier to relieve itself from its liability for the acts of its connecting carriers, who, in effect, are made its agents instead of the agents of the shipper.

The provisions of the act relied upon deal with two subjects-matter: rates and liability of the initial carrier for losses caused by connecting carriers. The subject-matter of § 196 of the Kentucky constitution is not rates, and it does not deal with the right of a common carrier to limit its liability for the acts of its connecting lines. It deals solely and exclusively, and its subject-matter is confined to the right of a common carrier to contract for relief from its common-law liability, for its own acts. The Interstate Commerce Act does not deal with the same

subject-matter as this section of the Kentucky constitution; and a Kentucky court, having jurisdiction of the parties, was entitled to interpret and to apply that law as it understood it without regard to the Federal statutes.

For the purpose of the Interstate Commerce Act, see *Armour Packing Company* v. *United States*, 209 U. S. 56; *N. Y., N. H. & H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company*, 204 U. S. 426; *Louis. & Nash. R. R. Co.* v. *Mottley*, 219 U. S. 467.

These sections of the act deal only with rates, and it cannot be said that Congress has legislated or attempted to legislate upon the subject dealt with by the state law. *Gulf, Colorado & Santa Fe Railway Company* v. *Hefley*, 158 U. S. 98, distinguished, as both the Federal and the state statutes dealt with the same subject-matter.

The state court had the right to administer the common law of Kentucky as it saw it, and unless the Congress of the United States has sought to prohibit a carrier engaged in interstate transportation from limiting, or to permit such a carrier to limit, its liability to a stipulated valuation, or has legislated upon that "precise" subject, the State of Kentucky may require common carriers although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not. *Pennsylvania Railroad Company* v. *Hughes*, 191 U. S. 477; *Chi., Mil. &c. Ry. Co.* v. *Solan*, 169 U. S. 133.

It was not the intention of Congress in prohibiting a common carrier from limiting its liability with respect to the obligations imposed by the Interstate Commerce Act, to wipe out every regulation made or upheld by the different States for the protection of their shippers. *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254, and *Greenwald* v. *Barrett*, 199 N. Y. 170.

The right of plaintiff to recover, even if the action was

founded on a transaction declared to be a public offense by an act of Congress, was a question of general common law and has been determined in his favor by the Kentucky court. *Railroad Company* v. *Hughes*, 191 U. S. 477, 486.

Ellison v. *Adams Express Co.*, 245 Illinois, 410, distinguished; and see *Adams Express Co.* v. *Walker*, 119 Kentucky, 121.

In this case the package was delivered to the express company without any inquiry or demand being made by the defendant to know its value or contents, and there was, therefore, no willful violation of the act. *Matter of Released Rates*, 13 I. C. C. Rep. 550–554.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in *Adams Express Company* v. *Walker*, 119 Kentucky, 121, 129, and affirmed in *Southern Express Company* v. *Fox and Logan*, 131 Kentucky, 257, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is

governed by the local law of the State, or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected: *Smith* v. *Alabama*, 124 U. S. 465; *New York &c. Railroad* v. *New York*, 165 U. S. 628; *Chicago, Milwaukee & St. P. Ry.* v. *Solan*, 169 U. S. 133, 137; *Richmond &c. Ry.* v. *Patterson Co.*, 169 U. S. 311; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477. In the *Solan Case*, cited above, it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In that case the court upheld the validity of an Iowa statute which made void every "contract, receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule, or regulation been made or entered into."

The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to $500 for injury to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

In *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 487, 491, there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter State, and the Supreme Court of the State upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that State. That case came to this court upon the contention that the Pennsylvania court in refusing to limit the recovery to the valuation agreed upon had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said (p. 487):

"It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms

of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. 379, 382; 25 U. S. Stat. 855, provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any

valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States.

The original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, c. 104, was extensively amended by the act of June 29, 1906, 34 Stat. 584, c. 3591. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in § 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack amendment. For convenience of reference, it is set out in the margin.[1]

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[1] That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

This amendment came under consideration in *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First: It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one State to a point in another."

Second: Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third: It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth: It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331; or that determined by the supposed public policy of a particular State, *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477; or that prescribed by statute law of a particular State, *Chicago &c. Railroad* v. *Solan*, 169 U. S. 133.

Neither uniformity of obligation nor of liability was

possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Co.* v. *Crenshaw*, 5 Ga. App. 675, 687, 63 S. E. Rep. 865, where that court said:

"Some States allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of

the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry.* v. *State of Washington*, 222 U. S. 370; *Southern Railway* v. *Reid*, 222 U. S. 424; *Mondou* v. *Railroad*, 223 U. S. 1.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding

carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier.

But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this court said of § 22 of this act of 1906 in the case of *Texas & Pac. Ry.* v. *Abilene Cotton Mills*, 204 U. S. 426, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in § 20, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to

destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been fifty-five cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made

was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type, "This Company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co.* v. *Illinois Central Railroad*, 3 Wall. 107; *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of

charges proportioned to the amount of the risk. *York Mfg. Co.* v. *Railroad*, 3 Wall. 107; *Railroad* v. *Lockwood*, 17 Wall. 357; *Hart* v. *Pennsylvania Railroad*, cited above; *Phœnix Ins. Co.* v. *Erie & W. Trans. Co.*, 117 U. S. 312, 322; *Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *New York, L. E. & W. Ry.* v. *Estill*, 147 U. S. 591, 619; *Primrose* v. *W. U. Tel. Co.*, 154 U. S. 1, 15; *Chicago &c. Ry.* v. *Solan*, 169 U. S. 133, 135; *Calderon* v. *Atlas Steamship Company*, 170 U. S. 272, 278; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, 485.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in *Hart* v. *Pennsylvania Railroad*, cited above, where it is said (p. 340):

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The

carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States. *Greenwald* v. *Barrett*, 199 N. Y. 170, 175; *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254, 259. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying (p. 259):

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty

as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In *Greenwald* v. *Barrett*, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in *Hart* v. *Penn. R. R. Co.*, 112 U. S. 331, 341."

To the same effect are the cases of *Travis* v. *Wells, Fargo Co.*, 79 N. J. L. 83; *Fielder* v. *Adams Express Co.*, 69 W. Va. 138; *S. C.*, 71 S. E. Rep. 99; *Larsen* v. *Oregon Short Line*, 38 Utah, 130; *S. C.*, 110 Pac. Rep. 983. See also, *Atkinson* v. *New York Transfer Co.*, 76 N. J. L. 608, as to the general rule.

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see 13 I. C. C. Rep. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled.

For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY *v.* MILLER.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 17. Argued March 8, 1912; reargued October 22, 1912.—Decided January 6, 1913.

Adams Express Company v. *Croninger*, *ante*, p. 491, followed to the effect that the Carmack Amendment of the Hepburn Act of June 29, 1906, regulating liability of interstate carriers, superseded all state regulations on the same subject.

85 Nebraska, 458, reversed.

THE facts, which involve the validity under the Carmack Amendment of schedules of rates based upon value and the extent of the liability of the carrier on bills of lading, are stated in the opinion.

Mr. Arthur R. Wells and *Mr. Robert B. Scott* for plaintiff in error.

Mr. Edwin E. Squires and *Mr. H. M. Sullivan*, with whom *Mr. Norris Brown* was on the brief, for defendant in error:

The Carmack Amendment to the Hepburn Act of June 29, 1906, does not abrogate the Iowa rule that the company can in no way limit its liability, but on the contrary incorporates that rule into the body of the Federal

law so that the Federal statute forbids the company in this case to limit its liability.

The Iowa state court has held that the Carmack Amendment did not contravene the local Iowa state rule. *Cramer* v. *Railway Co.*, 133 N. W. Rep. (Ia.) 387; *Betus* v. *C., B. & Q. R. R. Co.*, 129 N. W. Rep. (Ia.) 962; *Winn* v. *Am. Ex. Co.*, 128 N. W. Rep. (Ia.) 663. See also *Latta* v. *Railway Co.*, 172 Fed. Rep. 850; *Miller* v. *C., B. & Q. Ry. Co.*, 85 Nebraska, 458; *T. & S. F. Ry. Co.* v. *Rodgers*, 113 Pac. Rep. 80; *Railway Co.* v. *Pew*, 64 S. E. Rep. 35.

As a matter of fact the Carmack Amendment by necessary construction of language brings the Federal statutes into perfect accord with the Iowa and Nebraska rule, and expressly forbids a railway company from limiting its liability for its own negligence.

This statute clearly deals only with loss "caused" by the carrier, and the carrier is clearly made liable for loss due to its negligence, which is the situation in the case at bar.

The use of the word "any" is of paramount importance. "Any" in this context means "all." 1 Words and Phrases, 421; *Monongahela Nav. Co.* v. *Coon*, 47 Am. Dec. 474; 2 Cyc. 472 (note 21); *Jones* v. *Whitworth*, 30 S. W. Rep. (Tenn.) 736; *L. N. R. Co.* v. *Mottley*, 219 U. S. 479.

Under the decision of *Released Rates*, 13 I. C. C. Rep. 560, the Interstate Commerce Commission holds to this construction of the Carmack Amendment, and that as a matter of contract the carrier cannot limit its liability for its negligence in whole or in part.

In passing this act, Congress had chiefly in mind to compel the carriers to be fair with the shipper and to prevent discrimination.

Instead of the Federal statutes striking down state statutes and constitutions as to non-limitation of liability by conflict therewith, it exhibits no conflict and is in perfect accord with those of the Iowa and Nebraska type.

The carrier cannot, because it filed with the Commission a rate proportioned upon a declared valuation, in this case, shield itself from full liability for loss caused by it.

There is no Federal decision upon this point, but see *Cramer* v. *C., B. & Q. Ry. Co.*, 133 N. W. Rep. (Ia.) 388; *Railway Co.* v. *Pew*, 64 S. E. Rep. (Va.) 35.

The question of value as a basis of rates is no more a subject of contract than any other feature tending to make freight rates fixed and certain and to prevent discrimination. The value must be the true value or so near such as to stamp the proceedings with *bona fides*. The Federal statutes provide that there shall be no false classification and no false billing. It further provides for penalties for false classification and false billing whether done knowingly or not. To charge a rate upon a false value is to fix a false classification. Such a rate forbidden by law would bind neither carrier nor shipper. *T. & P. Ry. Co.* v. *Mugg*, 202 U. S. 242; *Railway Co.* v. *Hefley*, 158 U. S. 98; *Texas & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 431.

A provision for the limitation of liability unless it specifically so recites will not be construed to apply in the event of negligence on part of the carrier. This principle applies in the construction of the schedules made, offered and filed by the carrier. The salutary principle that the carrier should not escape the consequence of its negligence should not be lightly set aside and its language should not be interpreted to contravene the well-settled principles of public policy unless such interpretation is unavoidable. If the language of the schedules is not so interpreted and if the limitation of liability therein mentioned does not apply in the event of the negligence of the carrier, it is not a departure from the schedules filed when the carrier is held fully to such liability as arises from negligent conduct.

This case is not one which under the rule of the *Hart Case*, 112 U. S. 331, permits of a limitation of liability,

because, first, the alternative of rates offered is so arbitrary and unreasonable as to show a purpose of forcing an acquiescence on part of the shipper to the lower rate and thus to procure a limitation of liability; second, the value fixed is not fairly made, the variation from the true value being so great as to show bad faith and that the same was arbitrarily made for the purpose of obtaining a limitation of liability. *Released Rates*, 13 I. C. C. Rep. 565; *Cramer* v. *Railway Co.*, 133 N. W. Rep. (Ia.) 387.

A reasonable alternative of rates and an opportunity to contract with full common-law liability at a reasonable differential rate must be offered or the contract will be construed as unreasonable and void. *Railway Co.* v. *Cravens*, 38 Am. St. Rep. 230, and see note, 88 Am. St. Rep. 933; *L. & N. Ry. Co.* v. *Smith*, 134 S. W. Rep. 866; 6 Cyc. (Carriers), 401; 1 Hutchinson's Carriers, 427; *Southern Ry. Co.* v. *Jones*, 31 So. Rep. (Ala.) 501; *Railway Co.* v. *Henlein*, 23 Am. St. Rep. 578.

It cannot be said that the Carmack Amendment or any other Federal statute validates in terms a contract limiting liability for negligence of carriers. At most it can only be said that it does not forbid them. If then the question of estoppel is left for determination of principles of the common law, the state court may determine and apply these principles for itself. As long as the Federal statute is not in conflict with the law of the State, the latter remains operative and a carrier cannot limit its liability in the States of Iowa and Nebraska. The state statutes forbidding limitation of liability are enacted under the police power of the State, and so long as the state and Federal statutes are not in conflict both may stand. *Cramer* v. *Railway Co.*, 133 N. W. Rep. 387; *Railway Co.* v. *Solan*, 169 U. S. 98; *Railway Co.* v. *Hefley*, 158 U. S. 98; *Hennington* v. *Georgia*, 163 U. S. 299; *Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691.

MR. JUSTICE LURTON delivered the opinion of the court.

The question in this case, as in *Adams Express Company* v. *Croninger*, just decided, is whether the provisions of § 20 of the act of February 4, 1887, as amended by the act of June 29, 1906, 34 Stat. 584, c. 3591, constitute an exclusive regulation of contracts for interstate shipments of property by railroad common carriers, superseding all state regulations upon the same subject.

The action in this case was to recover the full value of a stallion shipped from a point in Iowa to a point in Nebraska, under a valued live stock contract. The loss occurred in the State of Nebraska through the negligence of the carrier, and the suit was in a court of that State.

The receipt or bill of lading placed a value upon the animal of two hundred dollars, and was signed by the shipper's agent. It recited that the schedules of rates and regulations filed with the Interstate Commerce Commission provide alternative rates of charges proportioned to the value of the stock delivered for transportation, as declared by the shipper, and that the recovery of the shipper in case of loss or injury should not be in excess of the value thus agreed upon for the purpose of determining the rate.

The plaintiff's claim is that the stallion was in fact of the value of two thousand dollars, and that the limitation of recovery stipulated is void under a statute of Iowa, where the contract was made, and also illegal and invalid under a clause in the constitution of Nebraska, the State in which the loss occurred and of the forum.

The Company relies upon the provisions of the act of 1906 as an exclusive rule regulating every contract for an interstate shipment and declaring the liability of the carrier, and contends that the regulations provided by § 20 of that act operate to supersede the legislation of both Iowa and Nebraska, in so far as they applied to interstate shipments.

This defense was overruled in the trial court, and the agreement in the plaintiff's bill of lading limiting any recovery in case of loss or damage to the value declared for the purpose of obtaining the lower or alternative rate of freight, was held to be illegal both under the law of Iowa and Nebraska, and judgment was rendered for the full value of the animal. This judgment was affirmed by the Supreme Court of Nebraska, that court ruling that the case was controlled by the state regulations referred to, and that these regulations had not been superseded by acts of Congress regulating interstate commerce. For this the court cited and relied upon certain decisions by the Nebraska courts, and the cases of *Chicago, M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133, and *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477. Both of the cases decided by this court were decided prior to the extensive amendment of the act regulating interstate commerce of 1887 by the act of June 29, 1906.

In *Adams Express Co.* v. *Croninger*, just decided, *ante*, p. 491, we reached the conclusion that by the provisions of § 20 of the latter act Congress had manifested a purpose to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein had superseded all state regulations upon the same subject. This case is therefore controlled by that judgment.

It follows that the Supreme Court of Nebraska erred in applying to the contract here involved the provisions of the Iowa statute, and of the constitution of the State of Nebraska, and in refusing to apply the exclusive regulation prescribed by § 20 of the act of 1906, as that provision has been construed by this court in the *Croninger Case*, above referred to.

The judgment is accordingly reversed and remanded for further proceedings not inconsistent with this opinion.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* LATTA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 231. Argued March 8, 11, 1912; reargued October 22, 23, 1912.—Decided January 6, 1913.

Decided on authority of *Adams Express Company* v. *Croninger*, *ante*, p. 491, and *C., B. & Q. Ry.* v. *Miller*, *ante*, p. 513.
172 Fed. Rep. 850, reversed.

THE facts, which involve the validity under the Carmack Amendment of schedules of tariff rates based upon values, and the extent of the liability of carriers under bills of lading, are stated in the opinion.

Mr. James B. Sheean for petitioner.

Mr. H. C. Brome for respondent.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action to recover the full value of two horses lost in the course of interstate transportation.

The defense in substance was that the plaintiff had declared the value of each of the animals to not exceed one hundred dollars, and had signed a shipping contract wherein he agreed that that was the value and that the company's liability in case of loss or damage should not exceed the agreed value. It was also shown that the schedule of tariff rates was based upon values and that a higher rate was allowable if a higher value had been declared. It was claimed that a limitation of liability made

for the purpose of obtaining the lower of alternative rates was admissible under the provisions of § 20 of the Interstate Commerce Act of June 29, 1906, 34 Stat. 584, c. 3591.

The Circuit Court instructed a verdict for the agreed value, ruling that the contract was valid and was controlled by the Interstate Commerce Acts. The Circuit Court of Appeals reversed this judgment, upon the ground that the contract was invalid under the constitution of the State of Nebraska, and held the plaintiff entitled to recover the full value of the animals. 172 Fed. Rep. 850. The case was remanded to the Circuit Court, where, in pursuance of the judgment and opinion of the Circuit Court of Appeals, the jury was instructed that it should find the actual value of the animals lost and return a verdict for that amount. Upon a second writ of error this judgment was affirmed by the Circuit Court of Appeals, and the cause has come to this court upon a writ of certiorari.

The case is governed by the cases of *Adams Express Company* v. *Croninger*, and *C., B. & Q. Ry.* v. *Miller*, both just decided.

Judgment reversed and the case is remanded for a new trial.

McNAMARA *v.* HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 687. Argued December 4, 1912.—Decided January 6, 1913.

Under § 5270, Rev. Stat., if the committing magistrate has jurisdiction and the offense charged is within the treaty and there is legal evidence

on which to exercise his judgment as to sufficiency of the facts to establish criminality for purposes of extradition, the decision of the magistrate cannot be reviewed on *habeas corpus*.

In this case there was competent evidence that the crime of burglary as defined by the law of the State where accused was arrested had been committed and extradition was properly granted under the treaties with Great Britain of 1842 and 1889.

Possession of the article stolen may tend to show guilty participation in the burglary, and so *held* in this case as to possession of an automobile.

Evidence should, if unexplained, be accorded its natural probative force.

Habeas corpus does not operate as a writ of error and mere errors are not subject to review, and so *held* as to an objection that depositions used in an extradition case were not properly certified.

THE facts, which involve the legality of an order of commitment for extradition, are stated in the opinion.

Mr. George Gordon Battle for appellant:

While a writ of *habeas corpus* does not perform the functions of a writ of error, the court will nevertheless go behind the commitment to ascertain whether there was any legal evidence to give the Commissioner jurisdiction.

The two general propositions of law which govern extradition proceedings are:

The law of the State where the alleged fugitive is apprehended must dominate. *Pettit* v. *Walshe*, 194 U. S. 205, 217; *Wright* v. *Henkel*, 190 U. S. 41, 58; *In re Frank*, 107 Fed. Rep. 272; *United States* v. *Greene*, 100 Fed. Rep. 941; *In re Ezeta*, 62 Fed. Rep. 972, 981.

There must be such competent evidence of probable cause as would justify a committing magistrate hearing a like proceeding in the State of New York in holding the alleged fugitive. *Benson* v. *McMahon*, 127 U. S. 457; *In re Herres*, 33 Fed. Rep. 165; *Matter of Calder*, 2 Edm. Seld. Cas. (N. Y.) 374; *Matter of Washburn*, 4 Johns. Ch. (N. Y.) 106; and see § 207, Code Crim. Proc. of New York; *Terlinden* v. *Ames*, 184 U. S. 270; *People* v. *Wells*,

57 App. Div. 140; Church, Hab. Corp., p. 319; *Ex parte Jenkins*, Fed. Cas. No. 7259; *In re Henry*, 35 N. Y. Supp. 210; *Perkins* v. *Moss*, 187 N. Y. 410, 418; *Ex parte Swartout*, 4 Cranch, 75.

There is no legal or competent evidence in the case at bar to show that a crime has been committed, or that the appellant committed the crime.

The evidence offered by the demanding government in support of two separate charges—of feloniously breaking into and entering the branch of the Bank of Montreal and of feloniously breaking into and entering Trapp's garage—was so co-mingled and intermixed in its presentation to the Commissioner, in that the second proceeding was commenced before the first was finally determined, that the Commissioner had no right to receive the evidence at all, or to base an order in either proceeding upon it.

There is no precedent for the hearing of two distinct and separate extradition proceedings at the same time, and the Commissioner had no jurisdiction to receive testimony in support of the second warrant before the first proceeding had been concluded.

Probable cause must exist to believe that a crime has been committed and that the defendant has committed it before he properly can be held for trial. *United States* v. *Bolling*, 24 Fed. Cas. 1189–1192; *United States* v. *Tureaud*, 20 Fed. Rep. 621–623, 624; 9 Fed. Stat. Ann. 254, 255; *Re Macdonnell*, 11 Blatchf. 170, 190; *Re Ezeta*, 62 Fed. Rep. 972, 982; *People* v. *Razezicz*, 206 N. Y. 249; 269.

Depositions improperly authenticated, and therefore incompetent, were erroneously introduced and allowed by the Commissioner. Section 5 of the act of August 3, 1882, 3 Fed. Stat. Ann. 90; *In re McPhun*, 30 Fed. Rep. 57, 60; *Re Farez*, 7 Blatchf. 345, 352; *In re Benson*, 30 Fed. Rep. 649, 654.

Mr. Charles Fox for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

John McNamara, the appellant, was arrested on the complaint of the British Senior Vice-Consul at the Port of New York charging him with committing the crime of burglary at New Westminster, British Columbia, in breaking into a building occupied as a garage and stealing therefrom an automobile and rugs. Examination was demanded, and after hearing the evidence submitted on both sides the United States Commissioner found probable cause and issued an order of commitment for extradition. Writs of *habeas corpus* and *certiorari* were then sued out upon the ground that the accused was restrained of his liberty without due process of law. The District Court dismissed the writs and this appeal is brought.

The question simply is whether there was any competent evidence before the Commissioner entitling him to act under the statute. The weight of the evidence was for his determination. The statute provides that if on the hearing, "he deems the evidence sufficient to sustain the charge," he shall certify the same to the Secretary of State and issue his warrant for the commitment of the accused pending surrender according to the stipulations of the treaty. Rev. Stat., § 5270. Under this provision, the rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on *habeas corpus*. *In re Oteiza y Cortez*, 136 U. S. 330, 334; *Benson* v. *McMahon*, 127 U. S. 457, 463; *In re Stupp*, 12 Blatchf. 501;

Ornelas v. *Ruiz*, 161 U. S. 502, 508; *Bryant* v. *United States*, 167 U. S. 104, 105; *Terlinden* v. *Ames*, 184 U. S. 270, 278; *Grin* v. *Shine*, 187 U. S. 181, 192; *Yordi* v. *Nolte*, 215 U. S. 227, 232; *Elias* v. *Ramirez*, 215 U. S. 398, 407; *Glucksman* v. *Henkel*, 221 U. S. 508, 512.

Without setting forth in detail the facts appearing from the depositions and testimony before the Commissioner, it is sufficient to say that there was competent evidence that the crime of burglary as defined by the law of New York where the appellant was arrested (Treaty with Great Britain, 1842, Art. X, 8 Stat. 572, 576; Treaty of 1889, Art. I, 26 Stat. 1508, 1509; Penal Law (N. Y.), §§ 400, 404) had been committed by a breaking into the building in question with intent to steal the automobile there kept. It was shown that this took place between four and six o'clock on the morning of September 15th, 1911. The car was taken out of the building and rolled about forty feet down the street, where shortly before six o'clock on that morning, according to testimony, the appellant was seen standing in front of the car "trying to crank it;" "he was trying," said the witness, "to start the machine off." Three men, unidentified, were with him. On an examination of the car soon after, it was found that the cover had been removed from the spark coil and that several of the electric wires forming part of the motive equipment had been disarranged in an effort, apparently, to operate the car despite the absence of a switch plug.

The District Court held that this was evidence connecting the appellant with the crime upon which, in the light of the circumstances proved, the Commissioner was entitled to exercise his judgment. We agree with this view. *Wilson* v. *United States*, 162 U. S. 613, 619, 620. It is objected that while possession of property recently stolen may be evidence of participation in the larceny, the apparent possession of the automobile by the appellant

affords no support for a conclusion that he committed the burglary, the crime with which he was charged. The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force. *Considine* v. *United States*, 112 Fed. Rep. 342, 349, 350; *Commonwealth* v. *McGorty*, 114 Massachusetts, 299; *Knickerbocker* v. *The People*, 43 N. Y. 177, 181; *Neubrandt* v. *State*, 53 Wisconsin, 89; *State* v. *Fitzgerald*, 72 Vermont, 142.

It is assigned as error that the Commissioner received in evidence certain depositions taken in British Columbia which were certified by the Consul-General of the United States as depositions proposed to be used upon an application for the extradition of the appellant upon another charge. We need not consider the sufficiency of this certificate, as the writ of *habeas corpus* does not operate as a writ of error and mere errors are not the subject of review. *Benson* v. *McMahon*, 127 U. S. 457, 461, 462; *Terlinden* v. *Ames*, 184 U. S. 270, 278. Irrespective of the depositions objected to, there was legal evidence on which to base the Commissioner's action.

Affirmed.

UNITED STATES v. PATTEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 282. Argued November 9, 10, 1911; reargued October 23, 24, 1912.—Decided January 6, 1913.

On appeal under the Criminal Appeals Act of March 2, 1907, this court must accept the lower court's construction of the counts, and its jurisdiction is limited to considering whether the decision of the

court below that the acts charged are not criminal is based upon an erroneous construction of the statute alleged to have been violated.

In order to decide whether acts charged are within the condemnation of a statute, the court must first ascertain what the statute does condemn and that involves its construction.

On appeal under the Criminal Appeals Act of 1907 this court must assume that the counts of the indictment adequately allege whatever the lower court treated them as alleging; and, where its decision shows that it assumed that every element necessary to form a combination was present, this court has jurisdiction to determine whether such a combination was illegal under the statute which defendants are charged with violating.

A conspiracy to run a corner in the available supply of a staple commodity which is normally a subject of interstate commerce, such as cotton, and thereby to artificially enhance its price throughout the country, is within the terms of § 1 of the Anti-trust Act of July 2, 1890.

Section 1 of the Anti-trust Act is not confined to voluntary restraints but includes involuntary restraints, as where persons not engaged in interstate commerce conspire to compel action by others or create artificial conditions, which necessarily affect and restrain such commerce.

A combination otherwise illegal under the Anti-trust Act as suppressing competition, is not the less so because for a time it may tend to stimulate competition—and so held as to a corner in cotton.

The Anti-trust Act does not apply to a combination affecting trade or commerce that is purely intrastate, or where the effect on interstate commerce is merely incidental and not direct; but although carried on wholly within a State, if the necessary operation of a combination is to directly impede and burden the due course of interstate commerce, it is within the prohibition of the statute; and so held as to a corner in cotton to be run in New York City.

Persons purposely engaging in a conspiracy which necessarily and directly produces the result which a prohibitory statute is designed to prevent are, in legal contemplation, chargeable with intending to produce that result; and so *held* that if the details of the conspiracy are alleged in the indictment an allegation of specific intent to produce the natural results is not essential.

The character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

187 Fed. Rep. 664, reversed.

THE facts, which involve the jurisdiction of this court under the Criminal Appeals Act of March 2, 1907, and whether a corner in cotton constitutes an illegal combination under the Sherman Anti-trust Act, are stated in the opinion.

The Solicitor General for the United States:[1]

The seventh count of the indictment charged that the defendants conspired to run a "corner" in cotton.

In construing the indictment the lower court held that the corner charged was an illegal combination, saying: "Corners are illegal. They are combinations contrary to public policy and all contracts and undertakings in support thereof are void. . . . A corner is altogether wrong, both from a legal and an economical standpoint. . . . The combination described in these counts is negatively illegal without any prohibitory statute and would be positively unlawful in any State having a statute against corners."

Therefore, this court must assume that the indictment sufficiently alleged the existence of an illegal corner, as this court is bound by the construction which the lower court places upon the language used in the indictment. *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Biggs*, 211 U. S. 507.

Contracts of purchase or sale for future delivery are valid even though (1) the purchaser's object is pure speculation and he intends not to receive and pay for them but he expects to resell them before delivery; (2) the seller has not the goods in his possession and has no means of obtaining them except by subsequently purchasing them, and (3) the parties at the time of delivery in fact settle upon the "difference" in price without an actual delivery.

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[1] Mr. Solicitor General Lehmann for the United States on the first argument.

It is only when both parties at the time of the contract intend to settle upon "differences" that the contract becomes illegal. *Sawyer, Wallace & Co.* v. *Taggart*, 14 Bush, 727; *Bibb* v. *Allen*, 149 U. S. 481, 492; *Clews* v. *Jamieson*, 182 U. S. 461, 489–495; *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 248; *Forget* v. *Ostigny*, App. Cas. (1895) 318.

A corner is a combination for the purpose of buying up for future delivery the greater portion of the available supply of a given commodity and entering into contracts for the future delivery of more than the available supply, and holding the same back from sale and not assigning or transferring the contracts of sale until the demand shall so outrun the supply as to enable the operators of the corner to advance the price abnormally. Black's Law Dictionary, 271; 9 Cyc. 978; *Booth* v. *Illinois*, 184 U. S. 425, 430.

Corners have universally been held to be illegal because affecting the natural course of trade and commerce and tending to enhance prices. *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Foss* v. *Cummings*, 149 Illinois, 353 (affirmed 40 Ill. App. 523); *Lamson* v. *Bryden*, 160 Illinois, 613; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Pacific Factor Co.* v. *Adler*, 90 California, 110; *Raymond* v. *Leavitt*, 46 Michigan, 447; *Sampson* v. *Shaw*, 101 Massachusetts, 145; *Samuels* v. *Oliver*, 130 Illinois, 73; *Wells* v. *McGeoch*, 71 Wisconsin, 196; *Wright* v. *Crabbs*, 78 Indiana, 487.

Any conspiracy although not technically a "corner" but having as its object the arbitrary increase or depression of prices is in restraint of trade. *Central Salt Co.* v. *Guthrie*, 35 Oh. St. 666; *Craft* v. *McConoughy*, 79 Illinois, 346; *India Bagging Association* v. *Kock*, 14 La. Ann. 168; *King* v. *Norris*, 2d Ld. Kenyon, 300; *Leonard* v. *Poole*, 114 N. Y. 371; *People* v. *Goslin*, 73 N. Y. Supp. 520; *People* v. *Milk Exchange*, 145 N. Y. 267; *People* v. *North*

River Sugar Co., 54 Hun, 354; *People* v. *Sheldon*, 139 N. Y. 251.

The rule to be extracted from all those cases is that any combination whose object is the enhancement of prices by virtue of combined effort is in restraint of trade and illegal.

The numerous cases in this court have held that combinations (*a*) to fix rates for railway transportation, (*b*) to determine the prices to be bid for pipe in public competition, (*c*) to sell tiles at a fixed price to non-members of the combination, (*d*) to combine railroads in one management through a holding company, (*e*) to bid the same prices for fresh meats, (*f*) to boycott dealers in one State who purchased from a factory in another State, (*g*) to secure control of the petroleum trade by stock ownership, (*h*) to acquire the tobacco industry, and (*i*) to control even intrastate terminal facilities where the effect was to give control over the access to the city from other States, are in restraint of interstate trade, because their object or necessary effect was (1) to suppress competition between those engaged in interstate commerce, (2) to enhance the prices of articles of such commerce, (3) to burden the free transaction of such commerce by one engaged therein or (4) to control some part of such commerce. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Loewe* v. *Lawlor*, 208 U. S. 274; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290.

A corner in cotton, which is a common object of interstate commerce and is produced in many States, is

clearly in restraint of trade because it interferes with the free flow of such commerce. *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 434; *United States* v. *St. Louis Terminal*, 224 U. S. 383, 397, 405; *Gibbs* v. *McNeeley*, 118 Fed. Rep. 120, 126.

The temporary and feverish stimulation of competition by the corner does not prevent it from being in restraint of trade, as *Montague & Co.* v. *Lowry* and *United States* v. *St. Louis Terminal*, each illustrates an increase of competition incident to a combination in restraint of trade.

In response to the suggestion that the effect of a corner on interstate commerce is only indirect and incidental, we submit that the only cases wherein it has been held that the contract or combination attacked was not in violation of the Sherman Act because its effect on interstate commerce was only incidental or indirect were *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (so explained and limited in the *Trans-Missouri*, *Addyston Pipe*, *Northern Securities*, *Swift & Co.*, *Danbury Hatters*, *Standard Oil*, and *American Tobacco cases* as to be of little value as authority), *Hopkins* v. *United States*, 171 U. S. 578 (as explained in the *Addyston Pipe*, *Montague*, and *Swift & Co. cases*), *Anderson* v. *United States*, 171 U. S. 604, and *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179. Obviously those decisions that fixing charges for local commission merchants and keeping out of business for five years in connection with the sale of property, were not in violation of the Sherman Act because of their purely indirect effect on interstate commerce are no precedents for holding that a corner in cotton affects interstate commerce only indirectly.

The lower court determined the meaning of the language used in the indictment, to wit, what acts are charged against the defendants, and such interpretation is conclusive upon this court. *United States* v. *Keitel*, 211 U. S.

370; *United States* v. *Biggs*, 211 U. S. 507. But under the Criminal Appeals Act this court has the right to determine whether the facts so alleged in the indictment constitute a violation of the Sherman Anti-trust Act. *United States* v. *Heinze*, 218 U. S. 532, 540; *S. C.*, 218 U. S. 550; *United States* v. *Bitty*, 208 U. S. 393.

Mr. George P. Merrick, with whom *Mr. William E. Church* was on the brief, for defendant in error Patten:

The argument of the Government is not confined to the allegations of the indictment. Black's Dictionary, 271; *Foss* v. *Cummings*, 149 Illinois, 353; *Samuels* v. *Oliver*, 130 Illinois, 73; *Wells* v. *McGeough*, 71 Wisconsin, 196.

The only effect of the Government's resort to the statement of overt acts is to accentuate essential defects of the indictment. That statement cannot, in law, and does not in fact, aid the indictment. *Pettibone* v. *United States*, 148 U. S. 197; *Smith* v. *United States*, 157 Fed. Rep. 721; *United States* v. *Patterson*, 55 Fed. Rep. 639; *United States* v. *Britton*, 108 U. S. 199.

Whatever restraint upon interstate commerce might result from acts charged, would be but indirect, remote and incidental. The statute only condemns acts having direct and immediate effect. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Aikens* v. *Wisconsin*, 195 U. S. 194; *Anderson* v. *United States*, 171 U. S. 604; *Bigelow* v. *Calumet & H. M. Co.*, 167 Fed. Rep. 721; *Cincinnati P. Co.* v. *Bay*, 200 U. S. 179; *Continental W. Co.* v. *Voight & Sons*, 212 U. S. 227; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Hopkins* v. *United States*, 171 U. S. 578; *Loewe* v. *Lawlor*, 208 U. S. 274; *Montague* v. *Lowry*, 193 U. S. 38; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Oklahoma* v. *Kansas N. G. Co.*, 221 U. S. 229; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *E. C. Knight & Co.*, 156 U. S. 1; *United States* v. *Joint T. Assn.*, 171 U. S. 509;

United States v. *Trans-Mo. Freight Assn.*, 166 U. S. 290; *United States* v. *Union P. R. R. Co.*, 188 Fed. Rep. 102; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Washington & G. R. R. Co.* v. *Hickey*, 166 U. S. 521.

This court has no jurisdiction to review the judgment of the Circuit Court because that judgment was not based upon a construction by it of the Anti-trust Act, but upon repeated constructions thereof by this court. Even if technically this court has jurisdiction, it will not exercise it merely for the purpose of reaffirming propositions already settled by it. *Davies* v. *Slidell*, 154 U. S. 625; *Equitable Life Ass'n Soc'y* v. *Brown*, 187 U. S. 308; *Leonard* v. *V. S. R. R. Co.*, 198 U. S. 416; *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Heinze*, 218 U. S. 532; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Mescall*, 215 U. S. 26.

Mr. John C. Spooner, with whom *Mr. Joseph P. Colton, Jr.*, and *Mr. George Rublee* were on the brief, for defendants in error, Scales *et al.*:

Under the Criminal Appeals Act the court may only review the construction of the Sherman Act by the Circuit Court. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Keitel*, 211 U. S. 370.

In sustaining the demurrer to the seventh count the Circuit Court did not wrongly construe the Sherman Act. That count does not charge a direct interference with interstate commerce. *Ware & Leland* v. *Mobile*, 209 U. S. 405; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Anderson* v. *United States*, 171 U. S. 604; *Hopkins* v. *United States*, 171 U. S. 578; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 65; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

The purchase of future contracts is not unlawful. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236.

No violation of any law except the Anti-trust Act is charged. *Anderson* v. *United States*, 171 U. S. 615; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. Rep. 454, 457.

In sustaining the demurrer to the third count the Circuit Court did not wrongly construe the Sherman Act. *Harriman* v. *Northern Securities Co.*, 197 U. S. 291; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 712.

The *Northern Securities Case* and the *Tobacco Case* can be distinguished.

The Sherman Act is not an instrument by which a district attorney can arbitrarily curb the amount of profit which an individual can make in buying and selling commodities, or even in speculating on an exchange—merely by an allegation (not susceptible of definite proof) which he inserts in an indictment, that it will have certain effects on interstate commerce.

The seventh count does not charge monopoly or combination with regard to the sale of cotton.

The ground of the illegality of corners is that they are gaming contracts.

The prosecutor avoids the fundamental question whether the conspiracy described would directly restrain interstate commerce.

The restraint of trade charged is indirect by reason of the intervention of voluntary acts of independent human agents. See the "Squib" Case, reported as *Scott* v. *Shepherd*, 2 Blackstone, 892.

If the Government's contention that count seven sets forth an offense under the Sherman Act, then every general strike of workmen is condemned by that statute. Certainly no such result was contemplated by the framers of the statute, and no such doctrine was announced in *Loewe* v. *Lawlor*, where the act complained of was an

immediate interference with a manufacturer's trade; where defendants physically obstructed the liberty of the plaintiff to trade in interstate commerce.

The corner count does not charge any combination to withhold cotton from sale. The Circuit Court's construction of the indictment in that regard is conclusive. *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Keitel*, 211 U. S. 370.

A defective charge of conspiracy cannot be aided by averments of overt acts. *Commonwealth* v. *Hunt*, 4 Met. 111; *Commonwealth* v. *Shedd*, 7 Cush. 514; *Conrad* v. *United States*, 127 Fed. Rep. 798; *McConkey* v. *United States*, 171 Fed. Rep. 829; *M'Kenna* v. *United States*, 127 Fed. Rep. 88; *Pettibone* v. *United States*, 148 U. S. 197; *Smith* v. *United States*, 157 Fed. Rep. 721; *United States* v. *Britton*, 108 U. S. 199; *United States* v. *MacAndrews*, 149 Fed. Rep. 823; *United States* v. *Milner*, 36 Fed. Rep. 890; *United States* v. *Patterson*, 55 Fed. Rep. 605.

The court has no jurisdiction to review the judgment of the Circuit Court.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a criminal prosecution under the Anti-trust Act of July 2, 1890, 26 Stat. 209, c. 647, the indictment being in eight counts. In the Circuit Court demurrers to the third, fourth, seventh and eighth counts were sustained and those counts dismissed, 187 Fed. Rep. 664, whereupon the Government sued out this writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, c. 2564. The case has been twice orally argued.

At the second argument the Government expressly abandoned the third and fourth counts and challenged only the ruling upon counts seven and eight. Thus, the

propriety of the ruling upon the first two need not be considered.

In passing upon the demurrers the Circuit Court proceeded first to construe the counts, that is, to ascertain with what acts the defendants are charged, and next to consider whether those acts are denounced as criminal by the Anti-trust Act, the conclusion being that they are not.

The limitations upon our jurisdiction under the Criminal Appeals Act [1] are such that we must accept the Circuit Court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the Anti-trust Act is based upon an erroneous construction of that statute.

At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we cannot assent. The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

Each of the counts in question charges the defendants and others with engaging in a conspiracy "in restraint of and to restrain," by the method therein described, "trade and commerce among the several States" in the supply of cotton available during the year ending September 1, 1910, such supply consisting of all the cotton grown in the

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[1] The act is set forth in full in 211 U. S. at page 398, and rulings thereunder are found in *United States* v. *Bitty*, 208 U. S. 393, 399; *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Biggs*, 211 U. S. 507, 518; *United States* v. *Mason*, 213 U. S. 115, 122; *United States* v. *Mescall*, 215 U. S. 26, 31; *United States* v. *Stevenson*, 215 U. S. 190, 195; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Heinze*, No. 2, 218 U. S. 547, 550; *United States* v. *Kissel*, 218 U. S. 601, 606; *United States* v. *Miller*, 223 U. S. 599, 602.

Southern States in that year and the cotton left over from prior years. The counts are long, and the acts which the Circuit Court treated as charged in them are indicated by the following excerpt from its opinion, the foot notes being ours:

"These counts are alike, with the exception of the statement of overt acts,[1] and each may be, broadly speaking, divided into three parts, which may be thus summarized:

"(1) The charging part contains a general charge of conspiracy in restraint of interstate commerce, with the usual formal and jurisdictional averments.

"(2) The second part contains a 'description of the trade and commerce to be restrained.' Under this head it is stated, in substance, that cotton is an article of necessity raised in the Southern States, which moves in large volume in interstate and foreign commerce, and that it is bought and sold upon the New York Cotton Exchange to such an extent as to practically regulate prices elsewhere in the country, so that future sales by speculators upon such exchange of more than the amount of cotton available at the time of delivery would create an abnormal demand and resultant excessive prices in all cotton markets.[2]

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[1] One count contained a statement of overt acts, while the other contained no such statement, a difference not here material.

[2] In order that the brief summary and analysis of the third part may be better understood, the second part is here reproduced:

"DESCRIPTION OF TRADE AND COMMERCE TO BE RESTRAINED.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that for many years past cotton has been grown, one crop a year, in divers of the States of the United States, among others, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Kentucky, Louisiana, Oklahoma, Texas, Arkansas, Missouri and New Mexico; that such cotton has been and is an article of prime necessity to the people of the United States, and the growing and the spinning and manufacturing of the same into yarns and fabrics have necessitated the cultivation of many millions of acres of land in the States last aforesaid and the employment of many thou-

"(3) The third part contains a 'description of the method devised and adopted by the conspirators for re-

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sands of persons, in those States and in other States of the United States, in connection with the planting, cultivating, picking, ginning, compressing, storing, selling, shipping, and transporting of such cotton; that about sixty per cent. of the cotton so grown has been shipped to and consumed in foreign countries in each crop year; that of the remaining forty per cent. of such cotton about one-half has been spun into yarns and manufactured into cotton fabrics by spinners and manufacturers in said Southern States for the use of the people of the United States and foreign countries, and the other half has been shipped to Northern States of the United States, among others, Massachusetts, Rhode Island, New York, Pennsylvania, New Hampshire, Maine, Connecticut, Maryland, New Jersey, and Delaware, in pursuance of sales of the same to spinners and manufacturers in the last-mentioned States, and there spun into yarns and manufactured into fabrics for the use of the people of the United States and foreign countries; that the demand for such cotton in foreign countries and in said Northern and Southern States has been steady and continuous throughout all portions of each crop year; that in the ordinary course of business said spinners and manufacturers have bought little or no cotton beyond that required by them for their immediate needs; that such cotton has been extensively bought and sold upon the Cotton Exchange in said city of New York for future delivery in the United States during current crop years, so much so that cotton bought and sold elsewhere in the United States than on that exchange has customarily been bought and sold at prices corresponding to the prices prevailing upon said exchange; that although, as the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, the rules of said Cotton Exchange at New York City have required that all sellers and purchasers of cotton upon that exchange for future delivery should contemplate the actual delivery and receipt of cotton sold and purchased by them there, it has been possible for more cotton to be sold at a given time or at given times upon said exchange for future delivery at a given time or given times during a current crop year by speculators, that is to say, persons not having any cotton in their possession, than would be in existence at such future time or times and available to such speculators for acquisition and delivery to the purchasers thereof; that under such circumstances it has been necessary for such sellers of cotton upon said exchange for such future delivery to make settlements with purchasers in cash or its equivalent, at the prices prevailing upon said

straining the trade and commerce.' It is alleged, at the outset, that the conspirators were to restrain trade and commerce by doing 'what is commonly called running a corner in cotton.' Averments then follow showing how the corner was to be brought about and its effect, which may be thus analyzed:

"(1) The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for future delivery greatly in excess of the amount available for delivery when deliveries should become due.[1]

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exchange at the time or times such settlements have been made, as to whatever cotton such sellers were unable to acquire and deliver to such purchasers when such delivery was due; that the artificial condition produced by such excessive purchases, when made, has invariably created such an abnormal demand for cotton on the part of such sellers that very excessive prices therefor have prevailed upon said exchange, and upon all other exchanges and in all cotton markets, until after such settlements have been made, so that bona fide purchasers of cotton for consumption in spinning and manufacturing have been compelled for a time to pay the same excessive prices in order to obtain cotton for their needs; that the cotton crop for the crop year beginning September 1, 1909, and ending September 1, 1910, approximated ten million and five hundred thousand bales; that about two hundred and sixty-five thousand bales of cotton were left over and available at the beginning of said crop year of the crops of prior crop years; that the foregoing allegations of this paragraph of this count of this indictment apply to the cotton of said crop year and to that of prior crop years; and that each of said conspirators, when so conspiring as in this count of this indictment set forth, well knew all the premises in this count aforesaid."

[1] The language of the charge is: "They were to make purchases from day to day upon said Cotton Exchange at New York City, from speculators, of quantities of cotton for future delivery at different times during said crop year greatly in excess of the amount of cotton which would be in existence and available for delivery to them by the sellers thereof when such deliveries were due, reference being had to the usages and requirements of said trade and commerce which are in this count above set forth."

"(2) By these means an abnormal demand was to be created on the part of such sellers who would pay excessive prices to obtain cotton for delivery upon their contracts.

"(3) The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

"(4) 'As a necessary and unavoidable result of their acts, said conspirators were to compel' cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs or else curtail their operations.

"(5) And also, as 'a necessary and unavoidable result' of said acts, an unlawful obstruction would be put upon interstate trade and commerce.[1]

"The offence charged, then, is a conspiracy in restraint of trade through the operation of a 'corner,' . . ."

Although ruling that there was no allegation of a specific intent to obstruct interstate trade or commerce and that the raising of prices in markets other than the Cotton Exchange in New York was "in itself no part of the scheme," the court assumed that the conspirators intended "the necessary and unavoidable consequences of their acts," and observed that "prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country."

Upon the second argument the defendants contended, and counsel for the Government expressly conceded, that "running a corner" consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, "one of the important features of which," to use the

[1] Of these allegations the court said in its opinion: "We must also assume that the allegations of the results to follow the conspiracy are more than the conclusions or economic theories of the pleader and amount to allegations of fact."

language of the Government's brief, "is the purchase for future delivery, coupled with a withholding from sale for a limited time;" and as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

Whilst thus agreeing upon what constitutes running a corner, the parties widely differ as to whether what is so styled in this instance contained the elements necessary to make it operative. The point of difference is the presence or absence of an adequate allegation that the purchasing for future delivery was to be coupled with a withholding from sale, without which, it is conceded by both parties, the market could not be cornered. But the solution of the point turns upon the right construction of the counts, and that, as has been indicated, is not within our province on this writ of error. We must assume that the counts adequately allege whatever the Circuit Court treated them as alleging. Its opinion given at the time, although not containing any express ruling upon the point of difference, shows that the counts were treated as alleging an operative scheme, one by which the market could be cornered. The court spoke of it as "contrary to public policy," as "arbitrarily controlling the price of a commodity," and as "positively unlawful in any State having a statute against corners." Evidently, it was assumed that every element of running a corner was present. We accordingly indulge that assumption, but leave the parties free to present the question to the District Court for its decision in the course of such further proceedings as may be had in that court.

We come, then, to the question, whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance

artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of § 1 of the Anti-trust Act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." The Circuit Court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce and agree to suppress competition among themselves, (2) that running a corner, instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling and that the answer to the question must be in the affirmative.

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. *Loewe* v. *Lawlor*, 208 U. S. 274, 293, 301. As was said of this section in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59:

"The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy

upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396–400; *Loewe* v. *Lawlor*, 208 U. S. 274; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Reading Co.*, 226 U. S. 324, 370.

The defendants place some reliance upon *Ware & Leland* v. *Mobile County*, 209 U. S. 405, as showing that the operation of the conspiracy did not involve interstate trade or commerce, but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a State of the business of a broker who was dealing

in contracts for the future delivery of cotton, where there was no obligation to ship from one State to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45–46; *Swift & Co.* v. *United States*, 196 U. S. 375, 386–387.

As we are of opinion that the statute does embrace the conspiracy which the Circuit Court treated as charged in counts seven and eight, as construed by it, its judgment upon those counts is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed in part.

MR. JUSTICE LURTON, dissenting.

The majority seem to base a judgment of reversal upon the assumption that the court below interpreted the counts in question as charging all the elements essential to a technical "corner." To this view of the opinion of the court below I do not assent. As I interpret that opinion the court held the count bad because it did not charge a "corner." Thus interpreted there was no error in quashing the count. I am authorized to say that the Chief Justice concurs in this dissent.

MR. JUSTICE HOLMES also dissents.

PLUMLEY *v.* UNITED STATES.

UNITED STATES *v.* PLUMLEY.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 35, 36. Argued December 9, 1912.—Decided January 6, 1913.

Where a contract for Government work provides that in case of discrepancies between the specifications and the contract, the matter shall be referred to the Secretary of the Department making the contract, and the contractor agrees to abide by his decision in the premises, the construction given by the Secretary and his decision is final and conclusive.

Where a contract for Government work provides that in every instance changes must be made by a prescribed method and approved by the Secretary, the contractor cannot recover for extras not ordered in the manner prescribed; and this rule holds even in a hard case where, as in this instance, the work was extra and of value.

Where the contractor fails to notify the Secretary of the cause of delay on the part of the Government in the manner prescribed by the contract and thus enable the Secretary to remove the cause of delay, the contractor cannot recover for the delay caused.

43 Ct. Cl. 266, reversed in part.

THE facts, which involve the construction of a contract for government work, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant in No. 35, and appellee in No. 36.

Mr. William W. Scott, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

In October, 1888, P. H. McLaughlin & Company contracted to build the Naval Observatory in Washington

for $307,811. After most of the work had been done the contract was forfeited for failure to make satisfactory progress. 37 Ct. Cl. 150. The Government advertised for bids to complete the work. After examining the contract and documents Plumley agreed to complete the building in accordance with the McLaughlin contract, and "duly authorized changes" by June 1st, 1892, for the sum of $25,840. Having finished the work, he sued the Government for damages by delay and for extra work amounting to $12,813. The court rendered judgment in his favor for $502 insurance paid during the period he was delayed in finishing the work. All of the other items were disallowed. Both parties appealed. 43 Ct. Cl. 266 and see 45 Ct. Cl. 185.

1. The largest item is a claim for extra compensation for installing a ventilator system, which McLaughlin agreed to do for a given sum. The proposed change and this offer were submitted by the architect to the Bureau of Equipment with the statement that if approved McLaughlin would enter into a formal written contract to do the work for the prices named. The plans and bid were approved. McLaughlin was directed to proceed, and did some work thereon. Later his contract was forfeited. Plumley (and his partner, Davis, a former member of McLaughlin & Company) knew these facts at the time the bid was made to complete the work, but when required to build the ventilating system Plumley insisted that it was not within McLaughlin's original contract and not a "duly authorized change" because no written contract had been signed by both parties, as required by the terms of the contract. This contention was rejected by the architect and, on appeal, by the Secretary of the Navy. The Court of Claims at first sustained this position but on a rehearing held that Plumley was estopped from claiming that the change had not been duly authorized and, under his contract to complete the work, was bound to finish

what McLaughlin had begun. Beyond this the contract provided that if there was any discrepancy between plans and specifications or between the contract of McLaughlin and the contract of Plumley the matter should be referred to the Secretary, Plumley agreeing "to abide by his decision in the premises." The Secretary decided against him and under the circumstances his construction is binding on the contractor.

2. This same provision prevents a recovery for the drain pipe included in the original contract. For some reason, not stated, it appears that McLaughlin was requested to make a bid for laying drain pipe. It was accepted and then countermanded. Plumley was likewise requested to make a bid, which was accepted and then countermanded. When required to lay the pipe he demanded extra compensation, but his appeal was overruled by the Secretary, possibly for the reason suggested in argument, that asking a bid did not relieve Plumley from the obligation to furnish labor and material actually included in the contract. What facts were submitted to the Secretary, is not in this record, but his ruling is conclusive, in view of Plumley's agreement to abide by his decision.

3. The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract.

Rev. Stat., § 3744; *Hawkins* v. *United States*, 96 U. S. 689; *Ripley* v. *United States*, 223 U. S. 695; *United States* v. *McMullen*, 222 U. S. 460.

4. The Government appeals from so much of the judgment as gave Plumley a judgment for damages caused by delay. The court found that Plumley was delayed by the failure to have the architect on hand promptly for decision pertaining to the work, while it also found that the Secretary extended the time for the reason that Plumley's failure to finish was on account of circumstances beyond the contractor's control. But Plumley at the time of the occurrence of the delay did not notify the Secretary of the facts nor of the extent to which the work would be delayed. The contract required that such notice should be given to the Secretary when the delay occurred, evidently for the purpose of informing the Department and enabling it, at the time, to remove the cause of the delay. It operated to prevent claims for damage and for failure to comply with this requirement of the contract (*United States* v. *Gleason*, 175 U. S. 588); the plaintiff is not entitled to recover. The judgment in that respect must be reversed, and is, otherwise,

Affirmed.

BUNKER HILL & SULLIVAN MINING AND CONCENTRATING COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 101. Submitted December 17, 1912.—Decided January 6, 1913.

Until it is finally determined that a homestead entry is void because made on mineral land open to mining location under the act of June 3, 1878, the land is segregated from the public domain and the entryman cannot cut timber thereon in violation of the law applicable to homestead entries.

An entryman claiming rights of a homesteader is estopped from defending against violations of the law on the ground that under another statute the land is not open to homestead entry.

One buying from an entryman lumber cut in violation of law from the homestead does so with notice and is liable for the timber unlawfully removed by the entryman.

178 Fed. Rep. 914, affirmed.

THE facts, which involve the rights of a homesteader to cut timber on the land entered and the effect of the entry as segregating the land from the public domain, are stated in the opinion.

Mr. Myron A. Folsom for plaintiff in error.

Mr. Assistant Attorney General Knaebel for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1903 Messenger made a homestead entry in the Cœur D'Alene Land District. He claimed to have entered in good faith and testified that he lived on the land with his family for some time. While thus in possession he cut many of the trees into stulls, which with the cordwood he sold to the Bunker Hill Company. In 1905 he abandoned the land and the Government brought suit against the Mining Company and recovered judgment for the value of the timber in its improved state. 178 Fed. Rep. 914.

In this court, plaintiff in error claims that the land not being suited for agricultural purposes, could not be entered as a homestead (Rev. Stat., § 2303), but being mineral land in fact was open to mining location and subject to the provisions of the act of June 3, 1878, 20 Stat. 88, c. 150, which authorizes any citizen to "enter upon public lands, being mineral lands," open to mineral entry in order to cut timber therefrom for mining purposes. It argues that the

homestead entry was void and that any citizen, Messenger included, could treat the land as public and cut the timber for mining purposes. It offered evidence tending to sustain its contention as to the character of the land, and excepts to the court's ruling that Messenger and his vendee were estopped from making such claim.

The statute on which the Mining Company relies, applies only to public lands, while this was no longer public in the full sense, although the title remained in the Government which could have cancelled Messenger's entry on proof that it was valuable for mineral purposes. *Deffeback* v. *Hawke*, 115 U. S. 392. But until some such action by the United States, Messenger's entry segregated the land from the public domain and made it so far private as to withdraw it from the operation of the law permitting other citizens to locate mines or cut timber on public mineral land. *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 537; *Shiver* v. *United States*, 159 U. S. 491, 495. Until his claim was cancelled Messenger was entitled to exclude others from the quarter-section. And as they would have been estopped, as against him, from denying that he was lawfully in possession of it as a homestead, so was he estopped from denying that it was a homestead when sued for cutting timber in violation of the law applicable thereto. He could not claim the rights of a homesteader in land intended for settlement and cultivation (Rev. Stat., § 2290) and at the same time defend under another statute which related to public land valuable for mineral purposes. The Mining Company bought with notice that Messenger was a trespasser, and is liable for the timber unlawfully removed by its vendor.

Affirmed.

THOMPSON *v.* THOMPSON.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 45. Argued November 8, 1912.—Decided January 6, 1913.

Notwithstanding the obligation to make continuing payments for maintenance of a wife and children is not, even when fixed by judicial decree, in the nature of a technical debt, it may, when so fixed, be estimated on expectancy of life, and the total amount may sustain a jurisdiction based on amount involved.

Statutory maintenance is assimilated to alimony under § 980 of the Code of the District of Columbia.

In this case, as the amount due under a judgment of the Supreme Court of the District of Columbia for support and maintenance at the rate of $75.00 a month together with amount to accrue due during expectancy of life of the wife amounts to over $5,000, this court has jurisdiction under the act of February 9, 1893.

The words "every court within the United States" as used in § 905, Rev. Stat., carrying into effect the full faith and credit clause of the Constitution, include the courts of the District of Columbia.

The full faith and credit clause of the Federal Constitution, and the statutes enacted thereunder do not apply to judgments rendered by a court having no jurisdiction.

Under the prior decisions of this court, service of the summons in a suit for divorce may be by publication if brought in a court of the State of matrimonial domicile. *Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562.

The state in which the parties were married, where they resided after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile and has jurisdiction over the absent wife.

A decree of divorce is not valid even when granted by a court of the State of matrimonial domicile except on actual notice to the defendant, or, if a non-resident, by publication according to the law of the State.

Where the law of the State of matrimonial domicile permits the affidavit on which an order of service by publication is granted to be

made on information and belief, the court acquires jurisdiction and the judgment based thereon is entitled to full faith and credit in the courts of other States.

This court is bound to assume, in the absence of any general law or policy of a State to the contrary being shown, that where the court adjudges the proceedings to be in accord with proper practice that such is the case.

Although an affidavit used as a basis for an order of publication of the summons may be defective in the mode of stating material facts, if the facts are stated, the judgment, though voidable on direct attack, is not void on its face and *coram non judice*.

Where the courts of a State have held that a wife may by her conduct forfeit the right to the support of her husband, and cannot have alimony on a divorce decreed in his favor, the courts of other States must give the decree full faith and credit as foreclosing the right of the wife to have alimony and a bar to a suit for maintenance in the courts of other States.

35 App. D. C. 14, affirmed.

THE facts, which involve the degree of faith and credit to be given by the courts of the District of Columbia to a judgment of divorce obtained in Virginia on service of the summons by publication, are stated in the opinion.

Mr. William M. Lewin for appellant:

This court has jurisdiction. Section 980 of the Code is declaratory of the inherent powers of a court of equity, and alimony and maintenance mean the same thing. *Lesh* v. *Lesh*, 21 App. D. C. 475, 488.

Prior to the effect of the Code the amount of alimony, even when in arrears, might, for cause shown, be changed by the court. *Tolman* v. *Leonard*, 6 App. D. C. 224, 233; *Davis* v. *Davis*, 29 App. D. C. 258, 263.

The Code provides for enforcement of decrees of the Supreme Court of the District of Columbia, and a decree for alimony, or maintenance, is no exception to this rule. It is subject to immediate execution, and is appealable. Code D. C., § 113; *Lesh* v. *Lesh*, 21 App. D. C. 475, 484, 485.

The court's discretion as to the amount is, in the first instance, judicial, not arbitrary. The discretion as to future installments is equally so, and such installments will not be interfered with except for good cause shown. *Weber* v. *Travelers' Ins. Co.*, 45 Fed. Rep. 657; *Langan* v. *Langan*, 86 California, 132, 133; *McCaddin* v. *McCaddin*, 116 Maryland, 567, 574.

It is not necessary that the amount in controversy should be expressly stated in the bill of complaint. *United States* v. *Freight Association*, 166 U. S. 290, 310; *Ex parte Bradstreet*, 7 Pet. 634, 647.

The appellate jurisdiction of this court extends to all cases in which there is a final decree involving more than five thousand dollars.

The decree of the Court of Appeals, from which this appeal is taken, is undoubtedly a final decree, and its finality is not affected by the fact that leave is given to apply at the foot of the decree. *C. & P. Tel. Co.* v. *Manning*, 186 U. S. 238, 241; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, 635.

A claim of alimony, even *pendente lite*, may afford the basis of this court's jurisdiction on appeal. *De La Rama* v. *De La Rama*, 201 U. S. 303, 318.

The fact that the decree provides that payment shall be made periodically, instead of *in solido*, does not affect the question of jurisdiction, as the amount of the possible, indeed reasonably probable, payments under the decree will exceed five thousand dollars. *B. & O. S. W. R. R.* v. *United States*, 220 U. S. 94, 106.

In determining the amount involved, for the purpose of appeal, the scope of the inquiry may be, and generally is, broader in a suit in equity than in a case at law. *Stinson* v. *Dousman*, 20 How. 461, 466–467; *N. E. Mortgage Co.* v. *Gay*, 145 U. S. 123, 131–132; *Troy* v. *Evans*, 97 U. S. 1, 3; *Marshall* v. *Holmes*, 141 U. S. 463, 595.

Jurisdiction in this case is measured by the value of

the right to be protected, and not by the value of some mere isolated element of that right. *Berryman* v. *Whitman College*, 222 U. S. 334, 346.

Statutes regulating appeals are remedial, and this court has always construed them liberally. *The Paquete Habana*, 175 U. S. 677, 682; *Wetmore* v. *Rymer*, 169 U. S. 115, 128; *Harris* v. *Barber*, 129 U. S. 366, 369–370; *Smith* v. *Whitney*, 116 U. S. 167, 173; *Audubon* v. *Shufeldt*, 181 U. S. 575, 578.

The decree is limited by the pleadings, which adhere to the requirements of the Code. The meaning of the decree, therefore, is that the husband shall pay to the wife at the least the sum of seventy-five dollars a month as long as the child may be dependent upon her for care and support. *Barnes* v. *Chic. &c. Ry.*, 122 U. S. 1; *Pierce* v. *Tenn. Coal &c. R. R. Co.*, 173 U. S. 1, 9; *Ex parte Hart*, 94 California, 254; *Carnig* v. *Carr*, 167 Massachusetts, 544; *McCaddin* v. *McCaddin*, 116 Maryland, 567, 574.

This court will take judicial notice of the usual tables, showing the expectancy of life of the parties and of the child. *Lincoln* v. *Power*, 151 U. S. 436, 441.

The Virginia decree was not final within the meaning of the full faith and credit clause of the Constitution. Virginia Code, § 3233.

Defendant was not served with process under the provisions of § 3232 of the Code of Virginia. *Raub* v. *Otterback*, 89 Virginia, 645.

This left the decree subject to be set aside in the discretion of the court.

While the appellant's rights cannot be made to depend upon this element of favor or discretion, it is sufficient to prevent the decree being final within the meaning of the full faith and credit clause of the Constitution. *Cheely* v. *Clayton*, 110 U. S. 701, 708; *Roller* v. *Holly*, 176 U. S. 398, 409; *Lynde* v. *Lynde*, 181 U. S. 183, 187.

The jurisdictional affidavit in the Virginia case, being

made upon information and belief, is not sufficient as a basis for an order of publication; such publication was therefore unauthorized and all proceedings based upon it null and void. *Hollingsworth* v. *Barbour*, 4 Pet. 466, 474; *Clowser* v. *Hall*, 80 Virginia, 864; *Rice* v. *Ames*, 180 U. S. 371, 374; *Holmes* v. *Holmes*, 15 Nebraska, 615, 616; *Fulton* v. *Levy*, 21 Nebraska, 478, 482. And see Virginia Code, § 2959, 3230, 3282; Form of Affidavit for Attachment, Code, p. 1571; Form of Order of Publication, Code, p. 1702.

An order of publication is not a pleading, it is process. *Loeb* v. *Columbia &c. Trustees*, 179 U. S. 472, 482; § 954, Rev. Stat.; *Brownfield* v. *South Carolina*, 189 U. S. 426, 428; *Tucker* v. *United States*, 151 U. S. 164, 169.

Process by means of publication is purely statutory and not according to the course of the common law, and it can only be instituted in the manner required by the statute. *Cooper* v. *Newell*, 173 U. S. 555, 572.

If the affidavit had been as to the defendant's domicile, which may present a mixed question of law and fact, there would be some basis for the contention that an affidavit upon information and belief would be sufficient, but as to the mere fact of residence the affidavit must be positive. *Jackson* v. *Webster*, 6 Munf. (Va.) 462, 464; *Clowser* v. *Hall*, 80 Virginia, 864.

Judgments which have an effect on personal rights, as in divorce suits, are not to be assimilated too closely to those cases in which the jurisdiction is acquired by seizure of the property involved. *Cooper* v. *Reynolds*, 10 Wall. 308, 319; *Hamilton* v. *Brown*, 161 U. S. 256, 274; *Haddock* v. *Haddock*, 201 U. S. 562, 576; *Dargan* v. *Richardson*, Dud. (S. C.) 62; *Allen* v. *Scurry*, 1 Yerg. (Tenn.) 36; *Lockwood* v. *Nye*, 2 Swan (Tenn.), 515; and see *In re Pensacola Lumber Co.*, 8 Benedict, 171, 174.

Mr. Joseph W. Cox, with whom *Mr. A. E. L. Leckie* and *Mr. John A. Kratz, Jr.*, were on the brief, for appellee:

This court is without jurisdiction; $5,000 is not involved.

The value must be actual value—not a value based upon speculation on possibilities. *Barry* v. *Mercein*, 5 How. 103; *Kurtz* v. *Moffitt*, 115 U. S. 487; *Durham* v. *Seymour*, 161 U. S. 235; *Huntington* v. *Saunders*, 163 U. S. 319; Foster's Fed. Practice, Vol. 1, 4th Ed., p. 87.

The decree of the Virginia court, if valid in Virginia, is binding upon the parties in the District of Columbia and a bar to the wife's claim for maintenance. *Atherton* v. *Atherton*, 181 U. S. 155. *Haddock* v. *Haddock*, 201 U. S. 562, does not apply to this case.

The two cases last cited hold that if a suit is brought at the matrimonial domicile of a husband whose domicile coincides with the domicile of matrimony, the decree obtained is, by virtue of the Constitution, entitled to full faith and credit; but that if the husband removes from the matrimonial domicile and the wife remains, a decree obtained by the husband in his new place of abode is not entitled to full faith and credit. And see *Downs* v. *Downs*, 23 App. D. C. 381; 14 Cyc. 729.

So long as the finding of wrongful desertion is undisturbed, the courts of Virginia could not allow maintenance to the wife. *Harris* v. *Harris*, 31 Gratt. 13, 17; *Carr* v. *Carr*, 22 Gratt. 168; *Latham* v. *Latham*, 30 Gratt. 338.

The effect of the decree in Virginia being to bar the wife's right to maintenance, it is also a bar to her suit for maintenance in the District of Columbia.

Under § 3233, Virginia Code, if appellant had sustained any injustice, by reason of the fact that she was an absent defendant and did not appear, she could at any time within three years have had said decree set aside by showing that it was inequitable or unjust to her.

The Virginia decree is not invalid in that State because of insufficiency of the affidavit filed as the basis of the order of publication.

Under § 3230, the affidavit is in all respects sufficient to form a basis for the publication. 7 Ency. Pl. & Pr. 110; 17 Ency. Pl. & Pr. 60; *Adam* v. *Hudson*, 98 Michigan, 51; *Pennoyer* v. *Neff*, 95 U. S. 714, 721; *Long* v. *Fife*, 45 Kansas, 271; *Belmont* v. *Cornen*, 82 N. Y. 256; *Rowe* v. *Palmer*, 29 Kansas, 240; *Smith* v. *Smith*, 3 Oregon, 363; *Ligare* v. *R. Co.*, 76 California, 610; *Lawson* v. *Moorman*, 85 Virginia, 880; *Harris* v. *Claflin*, 36 Kansas, 543; *Briton* v. *Larson*, 23 Nebraska, 806; *Fulton* v. *Levy*, 21 Nebraska, 478.

The giving of personal notice in the District of Columbia did not vitiate the constructive notice of publication and render the decree void in Virginia. 7 Ency. Pl. & Pr., p. 109; *Burnes* v. *Burnes*, 61 Mo. App. 612; *Dresser* v. *Wood*, 15 Kansas, 344.

In any event, the wife failed upon the testimony offered to establish that she was entitled to maintenance.

Mr. Justice Pitney delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, reversing a decree of the Supreme Court of the District in favor of the wife in a suit for maintenance, brought under § 980 of the District Code, act of March 3, 1901, 31 Stat. 1346, c. 854. The bill of complaint was filed July 29, 1907, and charged the husband with failing and refusing to maintain the complainant and with cruel treatment of such character as to compel her to leave him. Upon the filing of the bill a subpœna to answer was issued and returned "not found," whereupon *alias* and *pluries* writs were successively issued and returned until November 18, 1907, when the husband was served with process. Meanwhile, and on September 3, 1907, he brought suit against the wife in the Circuit Court of Loudoun County, Virginia, for divorce *a mensa et thoro*, upon the ground that on June 13, 1907, the wife wilfully abandoned his bed and board and deserted him

without cause, and that notwithstanding his repeated entreaties and endeavors to induce her to return she had refused to do so. An order of publication having been made and published, the Virginia court, on October 19, 1907, made a decree granting to the husband a divorce *a mensa et thoro*. He thereafter, on being served as already mentioned with process in the wife's suit, filed a plea setting up the Virginia decree and the proceedings upon which it was rendered, as a bar to her action. This plea was, on hearing, overruled, the husband being allowed time in which to answer the bill. He answered, denying the wife's charges of cruelty and setting up other matters pertaining to the merits, and also averred that his domicile, as well as the matrimonial domicile of the parties, was in Loudoun County, Virginia, and again pleaded the Virginia proceedings and decree as a bar to the wife's suit. The Supreme Court of the District upon final hearing held the Virginia divorce to be invalid and made a decree awarding to the wife custody of an infant child born to the parties during the pendency of the proceedings, and requiring the husband to pay to the wife $75 per month for the maintenance of herself and the child, to forthwith pay to her the sum of $500 for counsel fees, and also to pay the costs of suit to be taxed. From this decree the husband appealed to the Court of Appeals of the District, which court reversed the decree and remanded the cause, with directions to enter an order vacating the decree and dismissing the bill. 35 App. D. C. 14.

The present appeal is based upon § 8 of the act of February 9, 1893, to establish a Court of Appeals for the District of Columbia, and for other purposes (27 Stat. 434, 436, c. 74), which section gives a writ of error or appeal to review in this court any final judgment or decree of the Court of Appeals "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." Appellee challenges our jurisdiction

on the ground that the matter here in dispute does not exceed the sum mentioned.

Under the decree of the Supreme Court the payments of $75 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

Section 980 of the District Code (31 Stat. 1346, c. 854) upon which the present action is based, enacts—"Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able to do so, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony." The matter of permanent alimony is dealt with in §§ 976, 977 and 978, the latter of which provides—"After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects."

The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. See *Lynde* v. *Lynde*, 181 U. S. 183; *Audubon* v. *Shufeldt*, 181 U. S. 575, 578; *Lynde* v. *Lynde*, 64 N. J. Eq. 736, 751.

Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated.

The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record. In *Smith* v. *Whitney*, 116 U. S. 167, 173, the matter in dispute was stated to be "whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars." This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point, *Smith* v. *Adams*, 130 U. S. 167, 175; *South Carolina* v. *Seymour*, 153 U. S. 353, 358; *Simon* v. *House*, 46 Fed. Rep. 317, 318; *Chesapeake & Delaware Canal Co.* v. *Gring*, 159 Fed. Rep. 662, 664; and its authority upholds our jurisdiction in the case before us.

The next question is whether the Court of Appeals was right in holding that the Supreme Court of the District erred in refusing to give credit to the Virginia decree.

Art. IV, § 1, of the Constitution declares that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By § 905, Rev. Stat., the mode in which such acts, records, and proceedings are to be proved was prescribed; and it was enacted

that "The said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." This latter clause finds its origin in the first act passed by Congress to carry into effect the constitutional mandate (act of May 26, 1790, c. 11, 1 Stat. 122); and, in an early case, it was held that the words "every court within the United States" include the courts of the District of Columbia, and require those courts to give full faith and credit to the judicial proceedings of the several States when properly authenticated. *Mills* v. *Duryee*, 7 Cranch, 481, 484, 485.

But it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*. *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457; *Reynolds* v. *Stockton*, 140 U. S. 254; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 134.

This subject in its relation to actions for divorce has been most exhaustively considered by this court in two recent cases; *Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562. In the *Atherton Case* the matrimonial domicile was in Kentucky, which was also the domicile of the husband. The wife left him there and returned to the home of her mother in the State of New York. He began suit in Kentucky for a divorce *a vinculo matrimonii* because of her abandonment, which was a cause of divorce by the laws of Kentucky, and took such proceedings to give her notice as the laws of that State required, which included mailing of notice to the post-office nearest her residence in New York. No response or appearance having been made by her, the Kentucky court proceeded to take evidence and grant to the hus-

band an absolute decree of divorce. It was held that this decree was entitled to full faith and credit in the courts of New York. In the *Haddock Case*, the husband and wife were domiciled in New York, and the husband left her there, and, after some years, acquired a domicile in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce, based upon constructive and not actual service of process on the wife, she having meanwhile retained her domicile in New York, and having made no appearance in the action. The wife afterwards sued for divorce in New York, and obtained personal service in that State upon the husband. The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State.

In the present case it appears that the parties were married in the State of Virginia, and had a matrimonial domicile there, and not in the District of Columbia or elsewhere. The husband had his actual domicile in that State at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the *Atherton Case* and the principles upon which it rests, that the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that State could proceed to adjudicate respecting it upon grounds recognized by the laws of that State, although the wife had left the jurisdiction and could not be reached by formal process.

But in order to make a divorce valid even when granted by the courts of the State of the matrimonial domicile, there must be notice to the defendant, either by service of process, or (if the defendant be a non-resident) by such publication or other constructive notice as is required by

the law of the State. *Cheely* v. *Clayton*, 110 U. S. 701. *Atherton* v. *Atherton*, 181 U. S. 155, 171, 172. In *Cheely* v. *Clayton*, because the notice was published against the defendant without making such effort as the local law required to serve process upon her within the State, this court held, following repeated decisions of the state court, that the decree of divorce was wholly void for want of jurisdiction in the court that granted it; and that the liberty conferred by the local statute upon a defendant on whom constructive service only had been made to apply within three years to set the decree aside did not make it valid when the constructive service was so defective.

The Virginia decree now in question is attacked for want of jurisdiction on the ground that the affidavit used as a basis for the order of publication was made upon information and belief, and not upon personal knowledge. It is insisted that the order was therefore unauthorized and all proceedings based upon it null and void.

By § 3230 of the Virginia Code it is provided that—"On affidavit that a defendant is not a resident of this State . . . an order of publication may be entered against such defendant." Succeeding sections prescribe the form of the order, the mode of publication, and the proceedings to be taken when the order has been thus executed.

The record of the Virginia proceedings shows that on September 3, 1907, in the clerk's office of the Circuit Court of Loudoun County, "the said Charles N. Thompson filed an affidavit setting forth that the said Jessie E. Thompson was not a resident of the State of Virginia, said affidavit to be used as basis for an order of publication against the said Jessie E. Thompson, . . . in the words and figures following, to wit: 'Charles N. Thompson, plaintiff, this day made oath before me in said office that Jessie E. Thompson defendant in the suit aforesaid, is not a resident of the said State, as he is informed and verily believes.'"

This was certified by the clerk of the court as permitted by the state practice. The order of publication follows, which, after setting forth the title of the court, the names of the parties and the object of the suit, proceeds thus: "It appearing from legal evidence that the said defendant is not a resident of this State, it is ordered that she do appear within fifteen days after due publication hereof, in the clerk's office of our said court, and do what is necessary to protect her interests." There follow certificates of the publication and public posting of the required notice, and subsequent proceedings resulting in the final decree, which is to the following effect: "It appearing that the complainant hath proceeded regularly at rules to mature his suit against defendant, who is a non-resident of Virginia, both by personal service of process and by publication, in the mode prescribed by statute, this case was set down for hearing and came on this day to be heard on said proceedings at rules, the bill of complaint and the depositions of witnesses regularly taken and returned to the court; on consideration whereof, the court being of the opinion that complainant hath made out his case by legal evidence, doth adjudge, order and decree that the prayer of the bill be and the same is hereby granted; that the complainant, Charles N. Thompson, be and hereby is granted a divorce *a mensa et thoro* from said defendant Jessie E. Thompson; and that each of them be and he and she are divested of all marital rights in the other's property. And it is further ordered that this cause be placed upon the suspended docket, with leave to the complainant to apply for further relief whenever he may be advised that he is entitled thereto." (*Note:* We disregard the recital of "personal service of process," because the service referred to appears to have been made in the District of Columbia, and whether it was in season to serve any useful purpose under the Virginia practice is questionable.)

The record clearly imports a determination by the Virginia court that the affidavit of non-residence, although based upon information and belief, amounted to "legal evidence," and was in conformity with "the mode prescribed by statute." We are not referred to any provision of the Virginia Code, nor to any decision of the courts of that State, that excludes the use of such evidence for such a purpose. Section 3282 of the Code provides that "where an affidavit is required in support of any pleading, it shall be sufficient, if the affiant swear that he believes it to be true." Under the Code of 1874, chap. 148, § 1, which provided for the issuance of a writ of attachment against non-resident debtors, and required "an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant or one of the defendants is not a resident of this State, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is," it was held that so much of the affidavit as set forth the amount and justice of the claim, that there was present cause of action therefor, and that the defendant was non-resident in the State, must be absolute, and not made upon information and belief. *Clowser* v. *Hall*, 80 Virginia, 864. This decision was in 1885, and thereafter the section relating to foreign attachments was amended by permitting all of the averments of the affidavit to be based upon the belief of the plaintiff, his agent or attorney. Va. Code, § 2959.

We are not able to discover here or elsewhere any general law or policy of the State of Virginia excluding the use of affidavits based upon information and belief as the foundation of an order of publication. In the very decree before us the Virginia court has adjudged such an affidavit to be sufficient. We are therefore bound to assume that the use of such an affidavit is in accord with proper practice in that State.

But, were it otherwise, it seems well settled that where the affidavit used as the basis for an order of publication is defective, not in omitting to state a material fact, but in the mode of stating it or in the degree of proof, the resulting judgment, even though erroneous and therefore voidable by direct attack, cannot be said to be *coram non judice* and therefore void on its face. *Atkins* v. *Atkins*, 9 Nebraska, 191, 200; *Pettiford* v. *Zoellner*, 45 Michigan, 358, 362; *Adams* v. *Circuit Judge*, 98 Michigan, 51; *Long* v. *Fife*, 45 Kansas, 271; *Belmont* v. *Cornen*, 82 N. Y. 256; 7 Encyc. Pl. & Pr. 110; 17 Encyc. Pl. & Pr. 60, 61.

The material fact upon which, according to the laws of that State, the jurisdiction of the Virginia court depended, was the non-residence of the defendant. The Code required (§ 3230) that this fact should appear by affidavit. The affidavit in question set forth the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. In the absence of any local law excluding the use of such an affidavit the decision of the state court accepting it as legal evidence must be deemed sufficient on collateral attack to confer jurisdiction on that court over the subject-matter in accordance with local laws.

This being so, it is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that State provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the Circuit Courts, (Va. Code, §§ 2257, 2258, 2259, 2260, 2264, 2266; *Bailey* v. *Bailey*, 21 Gratt. 43; *Carr* v. *Carr*, 22 Gratt. 168; *Latham* v. *Latham*, 30 Gratt. 307); and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right she may by her conduct forfeit it, and where she is the offender she cannot

have alimony on a divorce decreed in favor of the husband, (*Harris* v. *Harris*, 31 Gratt. 13), it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.

From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District.

Decree affirmed.

EVANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 65. Argued December 5, 1912.—Decided January 6, 1913.

In this case *held* that the appointment of one holding a government position as special disbursing agent was not an appointment to a separate and distinct office from that already held, but merely an order requiring him to perform additional services, and under § 1765, Rev. Stat., payment therefor in addition to his salary is prohibited. *Woodwell* v. *United States*, 214 U. S. 82.

44 Ct. Cl. 549; 45 Ct. Cl. 169, affirmed.

THE facts, which involve the right under § 1765, Rev. Stat., of an employé of a Department to extra compensation for additional services, are stated in the opinion.

Mr. Jackson H. Ralston and *Mr. William E. Richardson*, with whom *Mr. Frederick L. Siddons* was on the brief, for appellant.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. P. M. Ashford* was on the brief, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case comes here on appeal from a judgment of the Court of Claims dismissing appellant's petition after hearing the merits and denying a motion for a new trial. 44 Ct. Cl. 549; 45 Ct. Cl. 169. Briefly, the facts are that the appellant, who was a chief of division and disbursing clerk of the Interior Department, receiving a salary of $2,000 per year, and was also disbursing clerk of the architect of the Capitol, for which he received annual compensation of $1,000, was appointed by the Secretary of the Interior on August 10, 1901, to act as a special disbursing agent to disburse an appropriation of $925,000 provided by the acts of June 6, 1900, and March 3, 1901, 31 Stat. 588, 619, c. 791, and 1133, 1163, c. 853, for the construction of additional buildings in the extension of the Government Hospital for the Insane in the District of Columbia. Further appropriations having been made by Congress, viz.: for an office and administration building $145,000, and for a central heating and lighting plant for the entire hospital $260,000, appellant was directed by the Secretary, under date January 5, 1903, to disburse these appropriations under his original appointment; and similar action was taken May 16, 1904, directing him to disburse an appropriation for painting the new buildings. Appellant accepted the appointment and gave bonds, first in the sum of $25,000, and afterwards in the additional sum of $75,000; he entered upon the duties and faithfully discharged them, and disbursed between August, 1901, and June, 1905, the sum of $1,410,761.87. In the order appointing him it was stated that for the service of disbursing the appropriation he would be allowed the maximum compensation permitted by law, not exceeding three-eighths of one per cent. The appointment of a special agent to make the disbursements was, in the judgment of the Secretary of the Interior, a necessity.

During the time appellant acted as such special disbursing agent he continued to hold the office of disbursing clerk of the Interior Department and to act as disbursing clerk of the architect of the Capitol, and for the performance of these duties received the salary and compensation first mentioned. For the special service of disbursing the appropriations for the Government Hospital he presented a claim for $5,290.36, payment of which was refused by the accounting officers of the Treasury Department, on the ground that at the time the special service was rendered he was holding two offices under the United States, the emoluments of which exceeded $2,500 a year, and that the charge for such special service was in violation of §§ 1763 and 1765, Rev. Stat., inasmuch as the act under which the appropriation was made did not provide for a special allowance to an agent for disbursing it.

Three sections that stand side by side in the Revised Statutes should be quoted:

"SEC. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is

authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

It seems to us that the appointment of the appellant as "special disbursing agent" was not an appointment to a separate and distinct office from those already held by him, but was merely an order requiring him to perform additional services in the way of disbursing public moneys. This being so, payment for the extra services is prohibited by the terms of § 1765, Rev. Stat., without reference to the fact that the appellant already held offices whose salary or annual compensation amounted to more than two thousand five hundred dollars. The case is within the authority of *Woodwell* v. *United States*, 214 U. S. 82. The fact that in the present case it was understood that the appellant should have additional pay makes this case different in its circumstances, but does not render inapplicable the statutory prohibition.

Judgment affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HUGHES, dissent.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* WULF.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 517. Argued December 3, 1912.—Decided January 6, 1913.

Where the jurisdiction of the Circuit Court does not depend entirely on diverse citizenship but is also founded upon a Federal statute and the amount exceeds one thousand dollars, the judgment of the Circuit Court of Appeals is not final under § 6 of the Judiciary Act of 1891.

Even if the petition in a suit against an interstate carrier for the death of one engaged in interstate commerce asserts a cause of action under the state statute, without referring to the Federal Employers' Liability Act, the court is presumed to be cognizant of the Federal act and of the fact that it has superseded state laws upon the subject.

Under the Federal Employers' Liability Act the beneficiaries of one killed cannot maintain an action against the employer except as personal representatives of the deceased; but where the plaintiff is sole beneficiary and takes out letters after the commencement of the action, the court may allow an amendment alleging that the plaintiff sues in the capacity of administrator.

An amendment to the effect that plaintiff sues as personal representative on the same cause of action under the Federal statute instead of as sole beneficiary of the deceased under the state statute, is not equivalent to the commencement of a new action and is not subject to the statute of limitations. *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, distinguished.

192 Fed. Rep. 919, affirmed.

THE facts, which involve the construction of the Federal Employers' Liability Act and to what extent amendments of pleadings are allowable, are stated in the opinion.

Mr. James Hagerman, *Mr. Joseph M. Bryson*, *Mr. Alex. S. Coke* and *Mr. A. H. McKnight*, for plaintiff in error, submitted.

Mr. Judson H. Wood, with whom *Mr. James P. Haven* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The defendant in error, Sallie C. Wulf, in her individual capacity, commenced this action January 23, 1909, in the Circuit Court of the United States for the Eastern District of Texas, to recover damages by reason of the death of her son, Fred S. Wulf, which occurred November 27, 1908, while he was in the employ of the defendant (now plaintiff in error) as a locomotive fireman, and in the performance of his duties as such upon a train bound

from Parsons in the State of Kansas to Osage in the State of Oklahoma. The original petition set up diversity of citizenship, plaintiff being alleged to be a *bona fide* inhabitant, resident and citizen of Texas, and the defendant a corporation organized under the laws of the State of Kansas. For cause of action it was averred that the decedent's death was the result of a bursting of the locomotive boiler, due to defects therein attributable to the negligence of the employer. It was further averred that—"Plaintiff is the mother of the said Fred S. Wulf and is a *feme sole:* and the said Fred S. Wulf was an unmarried man, leaving no wife or children surviving. That his father died prior to the time that he died, and plaintiff is the sole heir, next of kin, and beneficiary of the estate of the said Fred S. Wulf, deceased. That there is no administration pending on the said estate of the said Fred S. Wulf, within this State (Texas) or elsewhere, and that none is necessary. That said decedent was a resident citizen of the State of Texas when he was killed, but was temporarily working in Kansas. That by virtue of the laws of the State of Kansas, where the said Fred S. Wulf was killed, a right of action is provided by statute, for injuries resulting in death." The plaintiff demanded $40,000 damages. On May 19, 1909, defendant filed its original answer, consisting of a general demurrer, a general denial of the allegations of the petition, and averments that the injuries complained of were proximately caused and contributed to by deceased's own negligence and want of ordinary care and by that of his fellow-servants. No action appears to have been taken upon this pleading; but on January 6, 1911, defendant filed its first amended answer, consisting of a general demurrer; a special demurrer to the claim of $40,000 damages, on the ground that under the laws of Kansas the damages were limited to $10,000; and averments that at the time of the injury and death of deceased defendant was engaged in interstate commerce,

and deceased was in its employ and was himself engaged in interstate commerce, and that the cause of action is not governed by the laws of Kansas, but arises out of the Federal Employers' Liability Act of 1908. There was also a general denial of the allegations of the petition, and an averment of contributory negligence on the part of the deceased and of his fellow-servants. Upon the same day (January 6, 1911), the plaintiff filed her first amended original petition, averring that she was the sole heir and next of kin of Fred S. Wulf, deceased; that at the time of the filing of the original petition there was no administration upon his estate and no necessity for any; that on January 4, 1911, she was duly appointed temporary administratrix of his estate by the County Court of Grayson County, Texas, a court of competent jurisdiction, and qualified as such, with full power and authority to prosecute this suit as party plaintiff, and had made application to be appointed permanent administratrix; "That there now exists no necessity for an administration upon the estate of the said Fred S. Wulf, deceased, unless the same should be necessary for the sole purpose of prosecuting this suit as administratrix of said decedent for the benefit of herself as the surviving parent and next of kin of the said decedent; said plaintiff being the next of kin and sole beneficiary of whatever may be recovered in this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but in the event it shall be determined that she is not entitled to recover in said capacity, then she asks that she be allowed to recover as administratrix for her benefit as aforesaid. Therefore, she sues both in her individual capacity and as administratrix as aforesaid." The averment of diversity of citizenship was repeated, as were those averments of the original petition that set forth the cause of action. The amended petition further averred—"That by virtue of both the laws of the State of Kansas, where the said Fred S. Wulf

was killed, and the acts of Congress of the United States of America, a right of action is provided for injuries resulting in death in the manner and form and in the occupation that deceased was engaged in at the time of his death." This amendment was allowed by the court, and an order was made permitting the plaintiff to prosecute as the personal representative of the deceased for her individual benefit, as well as in her individual capacity. Thereafter the defendant filed its second amended answer, by which it excepted to that portion of the amended petition making Sallie C. Wulf a party plaintiff, because "under the act of Congress, known as the Employers' Liability Act, she is not a proper party to said suit;" excepted to that portion making her a party as temporary administratrix, "because she was not made a party thereto as such administratrix at the time of the filing of the original petition;" and excepted to that portion seeking to make her a party as administratrix, because the amendment making her a party in that capacity was made more than two years from the time the alleged cause of action accrued, and for that the cause of action, if any, was barred by the limitation of two years. There was also a general denial of the allegations of fact in plaintiff's petition contained, "except that this defendant says that at the time the said deceased was killed he was engaged in interstate commerce."

The exceptions being overruled, a trial was had upon the issues of fact, and resulted in a verdict and judgment in favor of the plaintiff (now defendant in error) for $7,000, which was affirmed by the Circuit Court of Appeals for the Fifth Circuit (192 Fed. Rep. 919), and the case comes here by writ of error.

The judgment of the Circuit Court being founded upon the Federal Employers' Liability Act, so that the jurisdiction of that court was not dependent entirely upon the diversity of citizenship of the parties, the judgment of the

Circuit Court of Appeals was not made final by § 6 of the Evarts Act, and thus (the matter in controversy exceeding one thousand dollars), there is a right to a writ of error from this court. Act of March 3, 1891, 26 Stat. 828, c. 517, § 6; Judicial Code of March 3, 1911, 36 Stat. 1087, c. 231, p. 1133, § 128; p. 1157, § 241.

The argument for reversal rests wholly upon the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of

Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employés injured in such commerce after its enactment it had the effect of superseding state laws upon the subject. *Second Employers' Liability Cases*, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co.* v. *Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within § 954, Rev. Stat.

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the Employers' Laibility Act. The change was in form rather than in substance. *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593, 603; *Atlantic & Pacific R. Co.* v. *Laird*, 164

U. S. 393, 395. See also *McDonald* v. *State of Nebraska*, 101 Fed. Rep. 171, 177, 178; *Patillo* v. *Allen-West Commission Co.*, 131 Fed. Rep. 680; *Reardon* v. *Balaklala Consol. Copper Co.*, 193 Fed. Rep. 189. Reliance is placed by plaintiff in error upon *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285. There the action was commenced in a state court of Missouri and afterwards removed to the United States Circuit Court. The original petition was based upon the common law of master and servant, and set up an injury to the plaintiff occurring in the State of Kansas while he was in the employ of the defendant, averring that the injury was due to the negligence of the defendant in employing and retaining in its employ as fellow-servant of the plaintiff one Kline, an incompetent person, with knowledge of his incompetency; afterwards plaintiff filed an amended petition, eliminating the charge of incompetency on the part of Kline and the averment of defendant's knowledge of such incompetency, and resting the cause of action exclusively upon the negligence of Kline as a fellow-servant of plaintiff, averring that the employer was liable to the plaintiff for the injury suffered by him through such negligence because a right of action was given in such case by the law of Kansas where the accident occurred. This court held that the amendment introduced a substantially new cause of action, to which the bar of the statute of limitations applied. But in that case, as is made plain in the opinion delivered by Mr. Justice White (now Chief Justice), the amended petition set up not only a different state of facts, but a different rule of law as the ground of the action; the original petition proceeding exclusively on the common law rule which held a master liable who with knowledge employs or retains an incompetent servant, and making no reference to the Kansas statute, nor averring negligence on the part of the fellow-servant, excepting so far as this might be inferred from the averment of his incompetency; while the amend-

ment relied upon the fellow-servant's mere negligence together with a statute of Kansas which made the master responsible for the consequences of the negligence of a fellow-servant. The action having been commenced in a Missouri court which would not take notice of the Kansas statute unless it were pleaded (*Babcock* v. *Babcock*, 46 Missouri, 243), this court held that the rule that the Federal courts take judicial notice of the laws of the several States did not apply. Since in the present case the Federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the *Wyler Case* is not controlling.

Judgment affirmed.

MR. JUSTICE LURTON entertains doubts as to whether the two years' limitation does not apply.

SCHMIDINGER *v.* CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 115. Argued December 20, 1912.—Decided January 13, 1913.

The right of the legislature, or the municipality under legislative authority, to regulate one trade and not another is well settled as not denying equal protection of the laws.

The right of the legislature, or the municipality acting under state authority, to regulate trades and callings in the exercise of the police power without Federal interference under the due process clause of the Fourteenth Amendment, is also well settled. *Gundling* v. *Chicago*, 177 U. S. 183.

The making and selling of bread, particularly in large cities, is obviously a trade subject to police regulation.

Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regula-

tion, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority.

The fact that laws prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes have been sustained by the courts of several States shows the necessity for police regulation of the subject.

Mere inconvenience to merchants conducting a business subject to police regulation does not vitiate the exercise of the power.

There is no absolute liberty of contract, and limitations thereon by police regulations of the State are frequently necessary in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment. *C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549.

The ordinance of Chicago of 1908 enacted under legislative authority, fixing standard sizes of bread loaves and prohibiting the sale of other sizes, is not unconstitutional as depriving those dealing therein of their property without due process of law or as denying them equal protection of the law or as interfering with their liberty of contract.

245 Illinois, 317, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the bread loaf ordinance of the City of Chicago, are stated in the opinion.

Mr. Harry Rubens, with whom *Mr. Benjamin F. Ninde* was on the brief, for plaintiff in error:

The prohibition of the making of loaf bread in weights such as were in large demand at the time of the passage of the ordinance in question in the ordinary and customary course of business, and in weights which are necessary to satisfy reasonable and legitimate business requirements, although the loaves are labeled in accordance with their exact weight, and therefore no fraud is attempted, unreasonably, arbitrarily and unnecessarily interferes with the legitimate pursuit of an ordinary, private and useful business and with the right of contracting in relation thereto. It thus deprives the plaintiff in error of liberty and property without due process of law. *Buffalo* v. *Collins Baking Co.*, 39 N. Y. App. Div. 432; *Lochner* v.

New York, 198 U. S. 45, 64, and see *Kansas* v. *McCool*, 83 Kansas, 428.

In whatever language a law may be framed, its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States. The police power cannot be put forward as an excuse for oppressive and unjust legislation. *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Lochner* v. *New York*, 198 U. S. 45, 64.

The sanitary provisions of the ordinance, and the requirements of correct labels and facilities for weighing are legitimate and appropriate regulations for the protection of health and for the prevention of imposition and fraud and are not complained of. The ordinance, however, improperly prohibits the making of contracts by the baker with his customer for large quantities of loaf bread, not for resale in the loaf but for restaurant and hotel use, in weights other than those fixed in the ordinance.

The plaintiff in error was charged with and found guilty of making and selling bread in loaves in excess of the prescribed weights, although correctly labeled as to the actual weight thereof and otherwise in accordance with the ordinance.

Cases relied on by the state court, such as *Munn* v. *The People*, 69 Illinois, 80; *S. C.*, *Munn* v. *Illinois*, 94 U. S. 113; *Guillotte* v. *New Orleans*, 12 La. Ann. 432; *Mayor* v. *Yuille*, relate to businesses affected with a public interest and to ordinances passed to meet conditions which have ceased to exist.

In *Paige* v. *Fazackerly*, 36 Barb. 392; *Re Nasmith*, 2 Ontario, 192; *Commonwealth* v. *McArthur*, 152 Massachusetts, 522; *People* v. *Wagner*, 86 Michigan, 594, either the

constitutional question was not raised at all or the ordinance was different from the one here involved, so that these cases do not apply.

The attack of plaintiff in error on the ordinance is directed not only, and not so much, to the power itself, when limited to ordinary retail sales and in the absence of legitimate special contracts to the contrary, but principally to the manner in which the power has been exercised by the City of Chicago. See *Attorney* v. *Farrell*, 18 Cox C. C. 321; 1 Dillon's Mun. Corp., 3d ed., p. 328; *Hawes* v. *City*, 158 Illinois, 653; *C. A. & R. R. Co.* v. *Carlinville*, 200 Illinois, 314; *Wice* v. *C. & N. W. R. R.*, 193 Illinois, 351, 356; *Chicago* v. *Gunning System*, 214 Illinois, 628.

The real purpose of the ordinance is arbitrarily to influence the price of bread. This appears from the schedules annexed to brief of plaintiff in error.

Mr. William H. Sexton and *Mr. Joseph F. Grossman*, for defendant in error, submitted:

The power of the City of Chicago to prescribe the weight of bread in the loaf is expressly conferred by statute, and the decision of the Supreme Court of the State of Illinois in the case at bar precludes this court from questioning the right to exercise that power by the City of Chicago. Starr & Curtis Ann. Stat. of Ill., vol. 1, p. 705; cl. 52, § 1, art. 5 of the Cities and Villages Act; *Schmidinger* v. *Chicago*, 243 Illinois, 167, 171; *Fischer* v. *St. Louis*, 194 U. S. 362; *People's Gas Light Co.* v. *Chicago*, 194 U. S. 1; aff'g 114 Fed. Rep. 384, 388; *Mobile, Jackson &c. R. R. Co.* v. *Mississippi*, 210 U. S. 187.

The regulation of the weight of bread in the loaf has been recognized by all courts as a legitimate exercise of the police power of the State. *People* v. *Wagner*, 86 Michigan, 594; *Paige* v. *Fazackerly*, 36 Barb. 392; *Commonwealth* v. *McArthur*, 152 Massachusetts, 522; *Schmidinger* v. *Chicago*, 243 Illinois, 167; *Kansas* v. *McCool*, 83 Kansas,

428; *In re Nasmith*, 2 Ontario, 192; *Guillotte* v. *New Orleans*, 12 La. Ann. 432; *Mayor* v. *Yuille*, 3 Alabama, 137.

Laws providing for the prevention and detection of imposition and fraud are generally held to be free from constitutional objection, on the ground that they are a proper exercise of the police power of the State. *Heath & Milligan Mfg. Company* v. *Worst*, 207 U. S. 338; *Lemieux* v. *Young*, 211 U. S. 489; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Chicago* v. *Bowman Dairy Co.*, 234 Illinois, 294; *Waterbury* v. *Newton*, 50 N. J. L. 534; *People* v. *Arensberg*, 105 N. Y. 123; *State* v. *Rogers*, 95 Maine, 94; *Commonwealth* v. *Waite*, 11 Allen, 264; *State* v. *Cipperly*, 101 N. Y. 634, rev'g 37 Hun, 219; *State* v. *Campbell*, 64 N. H. 402; *State* v. *Smyth*, 14 R. I. 100; *State* v. *Schlenker*, 112 Iowa, 642; *State* v. *Crescent Creamery Co.*, 83 Minnesota, 284; *State* v. *Williams*, 93 Minnesota, 155; *State* v. *Holton*, (Iowa), 126 N. W. Rep. 1125; *American Linseed Oil Company* v. *Wheaton* (S. D.), 125 N. W. Rep. 127.

The ordinance is not so arbitrary and unreasonable in its terms as to amount to a confiscation of the property rights of plaintiff in error or to a deprivation of his freedom of contract in the sale of bread, in violation of the Fourteenth Amendment.

Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of its police powers, and no person has such absolute and unqualified right of control over his liberty or property that it cannot be curtailed by the sovereign power of the state for the general welfare of the people. *Lochner* v. *New York*, 198 U. S. 45, 53; *St. Louis &c. Ry.* v. *Paul*, 173 U. S. 404, 409; *Holden* v. *Hardy*, 169 U. S. 366, 391, 392; *Lawton* v. *Steele*, 152 U. S. 133, 136.

A very wide discretion must be given to the legislative department of Government in determining the manner

and extent of the exercise of the police powers of the State. "Exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment, nor the crudeness, nor the impolicy nor even the injustice of state laws redressed by it." *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 354–355; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25, 31; *Otis* v. *Parker*, 187 U. S. 606, 608, 609; *Gundling* v. *Chicago*, 177 U. S. 183, 188; *Lawton* v. *Steele*, 152 U. S. 133, 136; *Crowley* v. *Christensen*, 137 U. S. 86, 91, 92; *Powell* v. *Pennsylvania*, 127 U. S. 678, 686.

The impossibility of baking a loaf of bread so that it will be of the weight prescribed in the ordinance at all times after it leaves the oven, does not render it unreasonable in view of the construction of the ordinance by the Supreme Court of the State of Illinois that it prohibits the sale of loaves of bread which are short in weight only.

In cases involving police power, the interpretation placed by the highest court of the State upon its statutes and the ordinances of its municipalities is conclusive on the Federal court. *Smiley* v. *Kansas*, 196 U. S. 447, 455; *St. Louis &c. Ry.* v. *Paul*, 173 U. S. 404, 408; *M., K. & T. Railway* v. *McCann*, 174 U. S. 580, 586; *Tullis* v. *L. E. & W. R. R.*, 175 U. S. 348, 353.

The ordinance does not by its terms, nor in effect, regulate the price of bread. *Chicago* v. *Schmidinger*, 243 Illinois, 167, 173.

MR. JUSTICE DAY delivered the opinion of the court.

The City of Chicago instituted suit against the plaintiff in error in the Circuit Court of Cook County, Illinois, to recover penalties for certain violations of an ordinance of that city. The violations alleged in the declaration which are material here consisted in the making and selling of loaves of bread differing in weight from the weights prescribed by the ordinance. Upon the first trial in the Cir-

cuit Court judgment was rendered in favor of the plaintiff in error, then defendant. The judgment was reversed upon appeal to the Supreme Court of Illinois and the case remanded to the Circuit Court (243 Illinois, 167). That court, following the decision of the Supreme Court of Illinois, rendered judgment for certain penalties against the plaintiff in error. The case was again appealed to the Supreme Court of Illinois and the judgment affirmed in a *per curiam* opinion, following 243 Illinois, *supra* (245 Illinois, 317). The case was then brought here on writ of error.

The ordinance in question, passed January 6, 1908, undertakes to regulate the sale of bread in the loaf within the City of Chicago, and the parts pertinent to the present case provide:

"Section 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago shall weigh a pound avoirdupois (except as hereinafter provided) and such loaf shall be considered to be the standard loaf in the City of Chicago. Bread may also be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves, and in no other way. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the city shall have affixed thereon in a conspicuous place a label at least one inch square, or if round, at least one inch in diameter, upon which label there shall be printed in plain type . . . the weight of the loaf in pound, pounds or fraction of a pound avoirdupois, whether the loaf be a standard loaf or not. The business name and address of the maker, baker or manufacturer of the loaf shall also be printed plainly on each label.

"Section 3. Every maker, baker or manufacturer of bread, every proprietor of a bakery or bakeshop, and every seller of bread in the City of Chicago shall keep scales and

weights, suitable for the weighing of bread in a conspicuous place in his bakery, bakeshop or store, and shall, whenever requested by the buyer and in the buyer's presence, weigh the loaf or loaves of bread sold or offered for sale.

"Section 4. If any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the City of Chicago, any bread . . . the loaf or loaves of which are not standard, half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves as defined in section 2 of this ordinance, . . . or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the City of Chicago any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm or corporation shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

"Section 5. The provisions of this ordinance . . . shall not apply to . . . what is commonly known as 'stale bread' sold as such, provided the seller shall at the time of sale, expressly state to the buyer that the bread so sold is stale bread."

The objections of a Federal character arise from alleged violations of the Fourteenth Amendment to the Constitution of the United States. The plaintiff in error avers that the due process clause of that Amendment is violated in that the ordinance is an unreasonable and arbitrary exercise of the police power and constitutes an unlawful interference with the freedom of contract included in the protection secured to the individual under that Amendment. In the Supreme Court of Illinois error was also assigned because of the violation of the clause of the Four-

teenth Amendment guaranteeing equal protection of the laws. That insistence does not appear to be made here, and the right of the legislature or municipal corporation under legislative authority to regulate one trade and not another is too well settled to require further consideration.

At the hearing the plaintiff in error introduced testimony which tended to establish the following facts: There are between 800 and 1,000 bakers in the City of Chicago, together making about fifty per cent. of the bread consumed in that city. Bread is sold in Chicago in large quantities at certain prices per loaf, 95% of the bread made by the bakers, outside of the restaurant business, consisting of loaves sold for five cents or multiples thereof, and 85% of such bread being sold for five cents a loaf. The five-cent loaf weighs about fourteen ounces when baked, and the weight of the bread in the loaf varies and is adjusted in accordance with the fluctuations in the price of raw material, labor and other elements of expense of production and the different qualities of bread and as a result of competition. There is a considerable demand in Chicago, especially in the restaurant trade, for bread in weights differing from those fixed by the ordinance. In some parts of the city bread weighing seven pounds is commonly sold. The moisture in the bread after it leaves the oven causes very appreciable shrinkage in weight, the extent of which depends upon the quality and size of the loaf, the atmospheric condition, and the dryness and temperature of the place where kept. It appears that in order to insure bread of the standard weight of sixteen ounces it is necessary to scale the dough before baking at about twenty ounces.

The record also shows that although the price of bread sold by the loaf in Chicago has generally been five cents or some multiple thereof, loaves of bread weighing approximately one pound have been sold for five, six and seven cents at different times.

The right of state legislatures or municipalities acting under state authority to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion. In *Gundling* v. *Chicago*, 177 U. S. 183, the doctrine was stated by this court as follows (p. 188):

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

See also in this connection *Holden* v. *Hardy*, 169 U. S. 366; *McLean* v. *Arkansas*, 211 U. S. 539, and other cases in this court reviewed and commented upon in those cases.

The making and selling of bread, particularly in a large city where thousands of people depend upon their supply of this necessary of life by purchase from bakers, is obviously one of the trades and callings which may be the subject of police regulation. This general proposition is conceded by counsel for plaintiff in error, but it is contended that the limitation of the right to sell bread which this ordinance undertakes to make in fixing a standard loaf of sixteen ounces and other half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves, is such an unreasonable and arbitrary exercise of legislative power as to render it unconstitutional and void. This court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the courts are

primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207, 223; *McLean* v. *Arkansas*, *supra*.

Furthermore, laws and ordinances of the character of the one here under consideration and tending to prevent frauds and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power. *McLean* v. *Arkansas*, *supra*, 550; Freund on Police Power, §§ 274, 275. Laws prescribing standard sizes of loaves of bread and prohibiting, with minor exceptions, the sale of other sizes, have been sustained in the courts of Massachusetts and Michigan. *Commonwealth* v. *McArthur*, 152 Massachusetts, 522; *People* v. *Wagner*, 86 Michigan, 594.

It is contended, however, that there are special circumstances in this case that take it out of this rule. The record shows, as we have already said, that the loaf of bread most largely sold in Chicago costs five cents and when it reaches the consumer is generally fourteen ounces in weight, and it is urged that to make a loaf of the standard size of one pound, as required by the ordinance, would be extremely inconvenient at least, owing to changes and evaporation after the loaf is baked, and that to insure a loaf of full standard size it would be necessary to use twenty ounces of dough. But inconveniences of this kind do not vitiate the exercise of legislative power. The local legislature is presumed to know what will be of the most benefit to the whole body of citizens. Evidently, the council of the City of Chicago has acted with the belief that a full pound loaf, with the variations provided, would

furnish the best standard. It has not fixed the price at which bread may be sold. It has only prescribed that the standard weight must be found in the loaves of the sizes authorized. To the argument that to make exactly one pound loaves is extremely difficult, if not impracticable, the Supreme Court of Illinois has answered, and this construction is binding upon us, that the ordinance is not intended to limit the weight of a loaf to a pound or the fractional part or multiple of a pound, but that the ordinance was passed with a view only to prevent the sale of loaves of bread which are short in weight. Thousands of transactions in bread in the City of Chicago are with people who buy in small quantities, perhaps a loaf at a time, and, exercising the judgment which the law imposed in it, the council has passed an ordinance to require such people to be sold loaves of bread of full weight. We cannot say that the fixing of these standards in the exercise of the legislative discretion of the council is such an unreasonable and arbitrary exercise of the police power as to bring the case within the rare class in which this court may declare such legislation void because of the provisions of the Fourteenth Amendment to the Constitution of the United States securing due process of law from deprivation by state enactments.

It is further urged that this ordinance interferes with the freedom of contract guaranteed by the Fourteenth Amendment, for it is said that there is a demand for loaves of bread of sizes other than those fixed in the ordinance, which demand exists among many people and also among contractors whose business requires special sizes to be made for them. This court has had frequent occasion to declare that there is no absolute freedom of contract. The exercise of the police power fixing weights and measures and standard sizes must necessarily limit the freedom of contract which would otherwise exist. Such limitations are constantly imposed upon the right to contract freely,

because of restrictions upon that right deemed necessary in the interest of the general welfare. So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense. See in this connection *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, and the previous cases in this court reviewed in the course of the opinion in that case.

We are unable to find that the decision of the Supreme Court of Illinois, affirming the judgment against the plaintiff in error, deprived him of the constitutional rights secured by the Fourteenth Amendment to the Federal Constitution.

Judgment affirmed.

EL PASO & SOUTHWESTERN RAILROAD COMPANY *v.* EICHEL & WEIKEL.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 252. Argued December 3, 1912.—Decided January 13, 1913.

This court cannot review a judgment of the State court under § 709, Rev. Stat., on the ground of denial of a Federal right, privilege or immunity unless the same was specially set up or claimed in the state court.

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in litigation and do not, unless specially so claimed, constitute the setting up of a Federal right or privilege.

In this case the insistence of plaintiff in error that his rights under a contract were to be determined according to the law of a different State, did not amount to claiming that full faith and credit was

denied to the law of another State so as to give a basis for a review of the judgment by this court under § 709, Rev. Stat.

Where, as in this case, it appears that the state court based its decision upon the interpretation of the contract and not upon the law of another State, there is no basis for review by this court on the ground of failure to give full faith and credit to the acts of another State.

The assertion of a Federal right in an unsuccessful application to the highest court of a State to grant a writ of error to a lower court of that State raises no question reviewable in this court.

Writ of error to review 130 S. W. Rep. 922, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of a state court on writ of error under § 709, Rev. Stat., are stated in the opinion.

Mr. A. B. Browne, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. W. C. Keegin* were on the brief, for plaintiff in error.

Mr. Philip W. Frey, with whom *Mr. Waters Davis*, *Mr. J. M. Coggin* and *Mr. Richard F. Burges* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Writ of error sued out under § 709, Rev. Stat., to review a judgment of the Court of Civil Appeals, that being the highest court of the State in which a decision in the suit could be had because the Supreme Court of Texas denied a petition for writ of error to review the judgment in that court.

The action was brought by defendants in error in the District Court of El Paso County, Texas, to recover damages for certain alleged breaches of contract committed by the railroad company, now plaintiff in error. Damages were recovered accordingly, and the judgment awarding them was affirmed by the Court of Civil Appeals. 130 S. W. Rep. 922. Whether the jurisdiction of this court is

properly invoked depends upon whether any Federal right or immunity was duly set up or claimed by the plaintiff in error in the state court, and there overruled.

The controversy in suit arose out of a written contract between the parties whereby the railroad company, owner of a railroad located in the then Territory of New Mexico, for the purpose of procuring crushed stone ballast from a quarry owned by it and situate in the Territory, agreed to provide a crushing and quarry plant capable of producing 1000 cubic yards of ballast in ten hours, with the necessary appurtenances and equipment, including coal, water, and railroad cars, and the defendants in error agreed that with and from said plant they would quarry, crush, prepare and deliver ballast at the rate of 750 cubic yards for each day's work, at prices fixed by the contract. The contract contained a clause providing that monthly payments to the extent of 90 per centum of the engineer's estimates should be made to the defendants in error during the progress of the work, with a final payment at the completion of the whole work contemplated, "upon the certificate of the Company's Engineer of Maintenance of Way that the Contractor has acceptably discharged all of his obligations under this agreement in conformity to the following specifications." Also the following, appended to the specifications: "The decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The plaintiffs, in their petition, set up numerous grounds of action. So far as they were submitted to the jury they

were summarized by the trial judge as follows: Plaintiffs alleged that the defendant failed to furnish a crusher plant of the capacity agreed to be furnished, that the plant actually furnished was of much less capacity, and that instead of furnishing coal and water of a quality reasonably sufficient and suitable for the purpose of operating the plant and quarry, the defendant furnished coal and water entirely unsuitable for that purpose; that by reason of the incapacity of the plant and the unsuitability of the coal and water, plaintiffs were prevented from producing the quantity of ballast required by the contract, and which they had a right to produce and would have produced but for the defendant's alleged defaults; that the cost of the ballast actually produced was greatly enhanced by reason of said defaults, and plaintiffs were finally compelled to shut down, and abandon their contract; wherefore they sought to recover the retained ten per cent., certain penalties that had been exacted under the terms of the contract for failure to produce ballast, and certain freight charges against them deducted by defendant for goods transported over its own line; and also to recover for the enhanced cost of production of the ballast actually produced and for the profits which they alleged they would have made under the contract if it had been fairly performed by the defendant.

The defense, so far as now pertinent, was, that the contract was made and intended to be performed in the then Territory of New Mexico and was made with reference to the laws in force therein, and that there was in that Territory, at the time of the making of the contract and at the time of the suit, "a certain non-statutory and unwritten law, to the effect that agreements such as those herein specially referred to (meaning the agreement respecting the arbitrament of the engineer), are valid and binding, and that neither of the parties to such contract and agreement has any right of action in a cause based

thereon, but must rely for a decision of such rights and claims on the determination thereof by such engineer."

This defense was set up by exceptions to the plaintiffs' petition, and by special pleas thereto. The cause proceeded to trial, whereupon the defendant introduced, for the purpose of showing the laws of New Mexico at the time the contract was made, certain decisions of this court, to wit: *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 U. S. 618; *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S. 549; *Chicago, Santa Fe &c. R. Co.* v. *Price*, 138 U. S. 185; *United States* v. *Robeson*, 9 Pet. 319, 327; *United States* v. *Gleason*, 175 U. S. 588; *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298. At the conclusion of the evidence the defendant, among other special charges, requested the court to instruct the jury that the contract sued on provided that the decision of the company's Engineer of Maintenance of Way should be final and conclusive in any dispute between the parties relative to the agreement, and that each of the parties thereby waived any right of action or other remedy at law, or otherwise, by virtue of the covenants of the agreement, and expressly agreed that the decision of the engineer should, in the nature of an award, be final and conclusive on the rights of the parties; that the contract was intended to be performed in the Territory of New Mexico, and that under the laws of that Territory the agreement referred to was a valid agreement, binding upon both parties; that under the laws of the Territory and the provisions of the contract made in pursuance thereof, the matters and things in dispute in this action should have been submitted to the decision of the engineer, and because they had not been so submitted and acted upon by him, no judgment could be rendered against the defendant arising out of the matters in dispute; and also, that if the jury believed from the evidence that the engineer had theretofore decided and determined that the plant

in question was of the capacity warranted, and the coal and water were serviceable for the purpose for which they were intended, and that all allowances which plaintiffs could be entitled to by reason of delay on account of the lack of coal and water, or the bad character of coal and water, had been in fact allowed by the engineer, and the plaintiffs had been paid therefor by the defendant, then the plaintiffs would not be entitled to recover in this action by reason of the incapacity of the plant or the character and quality of the coal and water furnished, unless the jury should further believe that in making such decisions and awards the engineer acted in fraud of the plaintiffs' rights, or in such ignorance thereof as to amount in law to a fraud.

The trial court refused to give these instructions, and on the contrary charged the jury that if the crusher plant installed by the defendant company did not have the stipulated maximum capacity, or if the water or coal was of a quality not reasonably suitable for the operation of the plant, and if by reason of either of these causes the production of ballast by the plaintiffs was reduced beneath 750 cubic yards per day, and beneath that which the plaintiffs would otherwise have actually produced with reasonable care, management, and diligence, and if plaintiffs suffered loss and damage by reason thereof, then the defendant would be liable for such loss and damage as was the proximate result of its failure to furnish a crusher plant of the guaranteed capacity, or to furnish reasonably suitable coal or reasonably suitable water.

In the opinion of the Court of Civil Appeals, the action of the trial court was sustained upon the following reasoning: "The question of the capacity of the crushing plant, the quality and sufficiency of the coal and water to successfully operate the plant to the end it was furnished plaintiffs by defendant, were not by the contract submitted to the engineer for his decision. These matters,

as we have seen, were conditions precedent to the contract which it was incumbent upon the defendant to perform in order that plaintiffs might carry out their part of the contract, and if defendant failed to perform them, and such failure proximately caused default of plaintiffs for which the penalties were assessed by the engineer, such assessments were wrong, and the amount paid by plaintiffs, if not voluntarily, are recoverable by them." And again: "It was not contemplated by the contract that defendant's engineer as an arbiter should determine the question whether a material provision in the contract was breached by either party and assess the damages occasioned by such breach; nor were such matters submitted to or determined by such engineer. If they had been, neither party would have been bound by his award; for they were such as could only be determined by a court of competent jurisdiction. Therefore, there was no error in the court's refusing special charges Nos. 43 and 45 (being those to which reference has been made), nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which required the court to prepare another charge thereon and submit it to the jury."

We have sufficiently indicated the general character of the controversy, the issues of fact and of law that were raised therein, and the disposition that was made of them. Whether this court has jurisdiction to review the resulting judgment depends, of course, upon whether in the course of the proceedings the plaintiff in error "specially set up or claimed" any "right, privilege, or immunity" under the Constitution or any statute of the United States, within the meaning of § 709, Rev. Stat.

It is contended that the decisions of this court that were introduced as evidence of the law of New Mexico in effect conferred upon the plaintiff in error the privilege and immunity of being protected against any action to recover

damages, except such as the engineer had decided were due to defendants in error; and that the failure of the state court to give effect to those decisions or to properly construe and apply the unwritten law of the Territory as established thereby, presents a Federal question as much as if an act of Congress had been disregarded.

But assuming (without, however, conceding) that the plaintiff in error was entitled to a "right, privilege, or immunity" in the premises, derived from the Federal Constitution or laws, the question remains whether such right, privilege, or immunity was "specially set up or claimed." An examination of the record discloses that while it was repeatedly insisted that the rights of the parties under the contract should be determined according to the law of the Territory of New Mexico, that such law was to be ascertained from the reported decisions of this court, and that under those decisions the clauses that gave finality to the decision of the company's engineer were valid and binding, and that the plaintiff's action was foreclosed thereby, it was not suggested that in so insisting the plaintiff in error was asserting or relying upon any right, privilege, or immunity derived from the Constitution or laws of the United States.

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in actions respecting written agreements. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550; 9 Cyc., Title "Contracts," 664–674; 2 Pars. Cont. *567, *582–*585; Story, Confl. Laws, §§ 231, 232, 241, 242, 270, 272, 280, etc. To insist, in such a litigation, that the matter ought to be controlled by the law of the place where the contract was made and to be performed, rather than by the law of the forum, is no more than to insist that the controversy shall be determined according to the rules of law properly applicable thereto.

The points raised by plaintiff in error that are now re-

lied upon as an assertion of Federal rights were brought to the attention of the trial court and of the Court of Civil Appeals like any other of the multitude of questions that were raised in those courts; and, so far as appears, the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the decisions of this court or the authority of those decisions as laying down the law of the Territory of New Mexico, but rather upon the ground that, upon the proper interpretation of the contract, the clause that was cited as giving finality to the decision of the company's engineer was not applicable to the questions in controversy.

We therefore deem it clear that plaintiff in error did not lay the foundation for a review under § 709, Rev. Stat., either in the trial court or in the Court of Civil Appeals.

After the denial by the latter court of a motion for rehearing, application was made to the Supreme Court of Texas for a writ of error, to the end that that court might review the judgment. In this application alleged Federal rights were for the first time asserted, it being assigned for error that the trial court and the Court of Civil Appeals had "refused to give full faith and credit to the public acts and laws of the Territory of New Mexico," etc., etc. The application was considered and refused, and a motion for a rehearing thereon was overruled. But since the Court of Civil Appeals is the highest court of the State that rendered a judgment reviewable here (*Stanley* v. *Schwalby*, 162 U. S. 255, 269; *Bacon* v. *Texas*, 163 U. S. 207, 215) the assertion of Federal rights in an unsuccessful application to the Supreme Court of the State for a writ of error raises no question that is reviewable in this court.

Writ of error dismissed.

OPINIONS PER CURIAM, ETC., FROM OCTOBER 14, 1912, TO JANUARY 13, 1913.

No. 396. KANSAS CITY, MISSOURI, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS EX REL. JOSEPH TAGGART, COUNTY ATTORNEY, ET AL. In error to the Supreme Court of the State of Kansas. Motion to dismiss or affirm or place on the summary docket submitted October 15, 1912. Decided October 28, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. (*American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89; *Williams* v. *Fears*, *ib.*, 270; *Billings* v. *Illinois*, 188 U. S. 97, 101; *Cook* v. *Marshall County*, 196 U. S. 261, 273–274; *Michigan C. R. Co.* v. *Powers*, 201 U. S. 245, 293; *Farrell* v. *O'Brien*, 199 U. S. 100; *Patterson* v. *Colorado ex rel. Attorney General*, 205 U. S. 254; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112, 118.) *Mr. John G. Park* for the plaintiff in error. *Mr. L. W. Keplinger* for the defendants in error.

No. 519. JACOB GLOS ET AL., PLAINTIFFS IN ERROR, *v.* THE CITY OF CHICAGO, IN TRUST FOR THE USE OF THE SCHOOLS, ET AL. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted October 21, 1912. Decided October 28, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. (*Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Howard* v. *Kentucky*, 200 U. S. 164, 172; *Tracy* v. *Ginsberg*, 205 U. S. 170, 177–178; *King* v. *West Virginia*, 216 U. S. 92, 101; *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79. Plaintiffs in error *pro sese*. *Mr. Angus Roy Shannon* and *Mr. George Gillette* for the defendants in error.

No. —. Original. *Ex parte* IN THE MATTER OF WALTER COOK, PETITIONER. Submitted October 28, 1912. Decided November 4, 1912. Motion for leave to file petition for a writ of habeas corpus and for a rule to show cause denied. *Mr. Milton Strasburger* for the petitioner. No one opposing.

No. 8. SOCIETE ANONYME DES SUCRERIES DE ST. JEAN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for Porto Rico. Argued October 30, 1912. Decided November 4, 1912. *Per Curiam:* Judgment affirmed. *Gonzales* v. *Buist*, 224 U. S. 126, 130; *Humes* v. *United States*, 170 U. S. 210, 212; *Schlemmer* v. *Buffalo R. R. Co.*, 205 U. S. 1, 10; *Improvement Co.* v. *Munson*, 14 Wall. 442, 448. *Mr. Colley W. Bell, Mr. Hugh B. Rowland* and *Mr. Benjamin S. Minor* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Denison* for the defendant in error.

No. 24. JOHN F. HANSON, PLAINTIFF IN ERROR, *v.* EMIL GUSTAFSON. In error to the Supreme Court of the State of Kansas. Submitted November 4, 1912. Decided November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Kimball* v. *Kimball*, 174 U. S. 158, 161–163, and cases cited. *Mr. John F. Hanson pro se. Mr. Emil Gustafson pro se.*

No. 312. THE NATIONAL TELEPHONE MFG. CO., PLAINTIFF IN ERROR, *v.* THE AMERICAN BELL TELEPHONE COMPANY. In error to the Circuit Court of the United States for the District of Massachusetts. Motion to dismiss

submitted October 28, 1912. Decided November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. *Carey* v. *Houston & T. C. R. Co.*, 150 U. S. 170, 181; *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161–162, and cases cited. Cause remanded to the District Court of the United States for the District of Massachusetts. *Mr. Louis T. Michener* and *Mr. Samuel W. Emery* for the plaintiff in error. *Mr. Robert M. Morse* and *Mr. Charles H. Swan* for the defendant in error.

No. 37. The Chicago & Erie R. R. Co., Plaintiff in Error, *v.* Joseph A. Ebersole. In error to the Supreme Court of the State of Indiana. Argued for the plaintiff in error November 7, 1912. Decided November 11, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Missouri Pacific Ry.* v. *Fitzgerald*, 160 U. S. 556, 576; *Chappell Chemical & Fertilizer Co.* v. *Sulphur Mines Co.*, 172 U. S. 471. *Mr. D. C. Harrington* for the plaintiff in error. No appearance for the defendant in error.

No. 138. Emma R. McCabe, Administratrix of Peter McCabe, Deceased, Plaintiff in Error, *v.* The Maysville & Big Sandy Railroad Company et al. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss submitted November 11, 1912. Decided November 18, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *Chesapeake & Ohio Railway Company* v. *McCabe*, 213 U. S. 207. *Mr. Allan D. Cole* for the plaintiff in error. *Mr. E. L. Worthington* for the defendants in error.

No. 236. ELIZA B. CLINGER, ADMINISTRATRIX, ETC., PLAINTIFF IN ERROR, *v.* CHESAPEAKE & OHIO RAILWAY COMPANY OF KENTUCKY ET AL. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss submitted November 11, 1912. Decided November 18, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *Chesapeake & Ohio Railway Company* v. *McCabe*, 213 U. S. 207. *Mr. Allan D. Cole* for the plaintiff in error. *Mr. E. L. Worthington* for the defendant in error.

No. 812. THE POST PRINTING & PUBLISHING COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* JOHN F. SHAFROTH, AS GOVERNOR, ETC., ET AL. In error to the Supreme Court of the State of Colorado. Motion to dismiss or affirm submitted November 11, 1912. Decided November 18, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *Chappell Chemical Co.* v. *Sulphur Mines Co.*, 172 U. S. 465, 471. *Mr. Booth M. Malone* for the plaintiff in error. *Mr. Benjamin Griffith*, *Mr. Henry J. Hersey*, *Mr. F. A. Williams* and *Mr. Horace N. Hawkins* for the defendants in error.

No. —. M. M. BRIGHT, ADMINISTRATOR OF ROBERT LARCK, DECEASED, v. THE CHESAPEAKE & OHIO RAILWAY COMPANY. Submitted November 11, 1912. Decided November 18, 1912. *Per Curiam:* The writ of error applied for in this case is denied. *Wilkinson* v. *Nebraska ex rel. Cleveland Society for Savings*, 123 U. S. 286. *In re Pennsylvania Company*, 137 U. S. 451, 454. *Mr. Herbert Fitzpatrick* for the Railway Company, the petitioner. No opposition.

No. 374. CHAN KAM, APPELLANT, *v.* LUTHER C. STEWARD and H. EDSELL. Appeal from the Circuit Court of

the United States for the Northern District of California. Motion to affirm submitted November 18, 1912. Decided December 2, 1912. *Per Curiam:* Judgment affirmed on the authority of *Low Wah Suey* v. *Backus*, 225 U. S. 460, and cause remanded to the District Court of the United States for the Northern District of California. *Mr. Carroll Cook* and *Mr. Corry M. Stadden* for the appellant. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Harr* for the appellees.

No. 375. YUK PING, ALIAS LEE SO MUI, APPELLANT, *v.* LUTHER C. STEWARD and H. EDSELL. Appeal from the Circuit Court of the United States for the Northern District of California. Motion to affirm submitted November 18, 1912. Decided December 2, 1912. *Per Curiam:* Judgment affirmed on the authority of *Low Wah Suey* v. *Backus*, 225 U. S. 460, and cause remanded to the District Court of the United States for the Northern District of California. *Mr. Carroll Cook* and *Mr. Corry M. Stadden* for the appellant. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Harr* for the appellees.

No. 760. F. B. WILLIAMS CYPRESS COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* THE STATE OF LOUISIANA. In error to the Supreme Court of the State of Louisiana. Motion to dismiss submitted December 2, 1912. Decided December 9, 1912. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *Appleby* v. *Buffalo*, 221 U. S. 524, 529, and cases cited. *Mr. Charlton R. Beattie* for the plaintiff in error. *Mr. Charles T. Wortham* for the defendant in error.

No. 62. TILLIE ANDERSON, PLAINTIFF IN ERROR, *v.* THE STATE OF CONNECTICUT. In error to the Supreme

Court of Errors of the State of Connecticut. Submitted December 5, 1912. Decided December 16, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. *Farrell* v. *O'Brien*, 199 U. S. 100. *Mr. Ernest L. Averill* for the plaintiff in error. *Mr. E. P. Arvine* for the defendant in error.

No. 70. ADDISON SHIP-Y-TUCK, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the District Court of the United States for the District of Kansas. Submitted December 5, 1912. Decided December 16, 1912. *Per Curiam:* Judgment affirmed upon the authority of *Hallowell* v. *The United States*, 221 U. S. 317. *Mr. F. T. Woodburn* and *Mr. A. E. Crane* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the defendant in error.

No. 73. ISAAC A. MANSOUR, APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Southern District of New York. Argued December 6, 1912. Decided December 16, 1912. *Per Curiam:* Judgment affirmed. *Mr. Paul Armitage*, *Mr. Walter S. Penfield* and *Mr. William L. Penfield* for the appellant. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the appellee.

No. 199. GEORGE FRED WILLIAMS, EXECUTOR OF THE ESTATE OF AMEY M. STARKWEATHER, PLAINTIFF IN ERROR, *v.* JOSEPH U. STARKWEATHER, ADMINISTRATOR, ETC. In error to the Supreme Court of the State of Rhode Island. Motion to dismiss or affirm submitted December 9, 1912. Decided December 16, 1912. *Per Curiam:*

Dismissed for the want of jurisdiction. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Miller* v. *Cornwell*, 168 U. S. 131; *Fayerweather* v. *Ritch*, 195 U. S. 299; *Farrell* v. *O'Brien*, 199 U. S. 100. *Mr. James A. Halloran* for the plaintiff in error. *Mr. Edward D. Bassett* for the defendant in error.

No. 300. B. Zavelo, Plaintiff in Error, *v.* Leichtman, Goodman & Company. In error to the Supreme Court of the State of Alabama. Motion to dismiss or affirm submitted December 16, 1912. Decided December 23, 1912. *Per Curiam:* Dismissed for the want of jurisdiction. *Chappell Chemical & Fertilizer Co.* v. *Sulphur Mines Co.*, 172 U. S. 465, and cases cited. *Mr. Oscar R. Hundley* for the plaintiff in error. *Mr. Samuel A. Putman* for the defendants in error.

No. 98. John Medley, Plaintiff in Error, *v.* The State of West Virginia. In error to the Supreme Court of Appeals of the State of West Virginia. Submitted December 16, 1912. Decided January 6, 1913. *Per Curiam:* Dismissed for the want of jurisdiction on the authority of *Spies* v. *Illinois*, 123 U. S. 131, 181; and *Seaboard Air Line Railway Co.* v. *Duvall*, 225 U. S. 477, 485–486, and cases cited. *Mr. Joseph M. Sanders* for the plaintiff in error. *Mr. William G. Conley* for the defendant in error.

No. 100. Park Rapids Lumber Company, Plaintiff in Error, *v.* The United States. In error to the Circuit Court of the United States for the District of Minnesota. Argued December 18, 1912. Decided January 6, 1913: *Per Curiam:* Judgment affirmed on the authority

of *United States* v. *Rickert*, 188 U. S. 432, 436; act of Congress of April 21, 1904, c. 1402, 33 Stat. 189, 209; *Heckman* v. *United States*, 224 U. S. 413, 437, and cause remanded to the District Court of the United States for the District of Minnesota. *Mr. Ransom J. Powell* and *Mr. George T. Simpson* for the plaintiff in error. *The Attorney General* and *Mr. Assistant Attorney General Knaebel* for the defendant in error.

No. —. Original. *Ex parte:* IN THE MATTER OF JEWELL KING, PETITIONER. Submitted December 23, 1912. Decided January 6, 1913. Motion for leave to file a petition for a writ of habeas corpus denied. *Mr. Burton Smith* for the petitioner.

Decisions on Petitions for Writs of Certiorari from October 14, 1912, to January 13, 1913.

No. 790. JOHN T. COOPER, PETITIONER, *v.* C. M. PRATT ET AL., PARTNERS, ETC. October 21, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. G. Linn, Mr. Aldis B. Browne* and *Mr. Alexander Britton* for the petitioner. No appearance for the respondents.

No. 799. JAMES D. HARDIN, PETITIONER, *v.* THE UNION TRUST COMPANY OF THE CITY OF PHILADELPHIA ET AL. October 21, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chambers Kellar* and *Mr. Ernest Wilkinson* for the petitioner. No appearance for the respondents.

No. 805. THE UNITED STATES, PETITIONER, *v.* A. GERO MARSHALL. October 21, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for the petitioner. *Mr. John M. Coleman* for the respondent.

No. 808. DUNLEVY & BROTHER COMPANY, PETITIONER, *v.* ELIZABETH FORREST. October 21, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry J. Nesbit* for the petitioner. *Mr. H. Fred Mercer* for the respondent.

No. 716. I. D. BLOCK ET AL., PETITIONERS, *v.* THE CITY OF MERIDIAN. October 28, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. Q. Hall* and *Mr. Joseph Hirsh* for the petitioners. *Mr. William H. Ambrecht* for the respondent.

No. 768. THE MAHONING VALLEY RAILWAY CO., PETITIONER, *v.* BELINDA O'HARA. October 28, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George F. Arrel* for the petitioner. *Mr. Charles Koonce, Jr.*, for the respondent.

No. 813. AMERICAN FIDELITY CO., PETITIONER, *v.* S. H. VELIE, DOING BUSINESS AS VELIE MOTOR COMPANY.

October 28, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph S. Brooks* and *Mr. Louis C. Boyle* for the petitioner. *Mr. Henry de L. Ashley* for the respondent.

No. 825. DETROIT STEEL COOPERAGE CO., PETITIONER, *v.* SISTERSVILLE BREWING CO. ET AL. November 4, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *Mr. George M. Hoffheimer, Mr. O. B. Taylor* and *Mr. Charles M. Kimball* for the petitioner. No appearance for the respondent.

No. 814. THE REPUBLIC RUBBER CO., PETITIONER, *v.* MORGAN & WRIGHT. November 4, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Marshall A. Christy* for the petitioner. *Mr. Antonio Knauth* for the respondents.

No. 832. THE MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY ET AL., PETITIONERS, *v.* MRS. BESSIE SCHINNERRER; and No. 833. MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO. ET AL., PETITIONERS, *v.* MRS. EMMA HURST. November 4, 1912. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frank S. Masten, Mr. Charles M. Johnson, Mr. R. P. Cary* and *Mr. Charles H. Stephens* for the petitioners. *Mr. F. Zimmerman* for the respondents.

No. 835. NEW YORK, NEW HAVEN & HARTFORD R. R. Co., OWNER, ETC., PETITIONER, *v.* RIVER & HARBOR TRANSPORTATION CO. November 4, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward D. Robbins* for the petitioner. *Mr. Charles C. Burlingham* for the respondent.

No. 822. JOHN L. HART, ADMINISTRATOR, ETC., PETITIONER, *v.* THE NORTHERN PACIFIC RAILWAY COMPANY. November 11, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Francis B. Hart* for the petitioner. No appearance for the respondent.

No. 830. JOHN W. PATTERSON, PETITIONER, *v.* THE UNITED STATES. November 18, 1912. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Matthew E. O'Brien* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 809. E. A. BLOUNT ET AL., PETITIONERS, *v.* GEORGE E. DOWNS ET AL. December 2, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. C. McReynolds* and *Mr. George C. Greer* for the petitioners. *Mr. Hiram M. Garwood* and *Mr. Maxwell Evarts* for the respondents.

No. 841. DAN KOVOLOFF, PETITIONER, *v.* THE UNITED STATES. December 2, 1912. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* and *Mr. John F. Geeting* for the petitioner. *The Attorney General* and *The Solicitor General* for the respondent.

No. 850. FARMERS & MECHANICS' BANK OF VANDALIA, ILL., PETITIONER, *v.* HARRISON W. MAINES. December 2, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bernard B. Selling* for the petitioner. *Mr. John C. Donnelly* for the respondent.

No. 855. THE WORK MINING & MILLING COMPANY, PETITIONER, *v.* THE DR. JACK POT MINING COMPANY. December 9, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles S. Thomas*, *Mr. Henry C. Hall*, *Mr. William H. Bryant* and *Mr. George L. Nye* for the petitioner. *Mr. William V. Hodges* for the respondent.

Nos. 860 AND 861. BYRON E. VAN AUKEN ET AL., PETITIONERS, *v.* THE MONASH-YOUNKER COMPANY. December 9, 1912. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. Clarence Poole* for the petitioners. *Mr. Thomas A. Banning* for the respondent.

No. 810. LUTCHER & MOORE LUMBER COMPANY ET AL., PETITIONERS, *v.* WILLIAM H. KNIGHT ET AL. Decem-

ber 16, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. P. Pujo* for the petitioners. No appearance for the respondents.

No. 839. CHARLOTTE CASSIDY, PETITIONER, *v.* SILVER KING COALITION MINES COMPANY. December 16, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John A. Shelton* for the petitioner. No appearance for the respondent.

No. 856. FLORENCE A. HARPER, PETITIONER, *v.* LOUIS L. TAYLOR. December 16, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James H. Vahey* for the petitioner. *Mr. Lewis Miles* for the respondents.

No. 872. WILLIAM W. WISHART, ETC., PETITIONERS, *v.* SUPREME COUNCIL OF THE ROYAL ARCANUM. December 16, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. A. S. Worthingtom* and *Mr. J. Roy Dickie* for the petitioners. *Mr. Joseph A. Langfitt* for the respondent.

No. 845. C. E. MITCHELL, PETITIONER, *v.* THE UNITED STATES. December 23, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for

the Ninth Circuit denied. *Mr. Hosea B. Moulton* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 866. THE SKEELE COAL COMPANY, PETITIONER, *v.* GOHEN C. ARNOLD, TRUSTEE IN BANKRUPTCY, ETC. December 23, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Nicholas W. Hacker* for the petitioner. *Mr. C. Andrade, Jr.*, for the respondent.

No. 874. MRS. BESSIE SCHINNERRER ET AL., PETITIONERS, *v.* MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY ET AL. December 23, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. F. Zimmerman* for the petitioners. *Mr. Frank S. Masten* for the respondent.

No. 879. JOHN M. CONROY ET AL., PETITIONERS, *v.* PENN ELECTRICAL MANUFACTURING COMPANY. December 23, 1912. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Paul Synnestvedt* for the petitioners. *Mr. Edward Rector* and *Mr. J. M. Nesbit* for the respondent.

No. 881. CHARLES F. ALLEN, EXECUTOR, ETC., PETITIONER, *v.* SEABOARD AIR LINE RAILWAY ET AL. January 6, 1913. Petition for a writ of certiorari to the United

States Circuit Court of Appeals for the Second Circuit denied. *Mr. Ferdinand E. M. Bullowa* for the petitioner. *Mr. James Byrne* for the respondents.

No. 883. HOWARD H. SYPHER ET AL., PETITIONERS, *v.* BOUVIER-IAEGER COAL LAND COMPANY. January 6, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John H. Holt* for the petitioners. *Mr. George E. Price* for the respondent.

No. 892. THE KEYSTONE TYPE FOUNDRY, PETITIONER, *v.* NATIONAL COMPOSITYPE COMPANY. January 6, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. W. Bradford* for the petitioner. No appearance for the respondent.

No. 895. WALTER MURPHY, PETITIONER, *v.* ASHLEY M. GOULD, ASSOCIATE JUSTICE, ETC. January 6, 1913. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John Altheus Johnson* for the petitioner. No appearance for the respondent.

No. 887. J. L. SHINE, PETITIONER, *v.* THE UNITED STATES. January 13, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. S. Welch* for the petitioner. *The Attorney General* and *Mr. Assistant Attorney General Harr* for the respondent.

No. 906. THE HARTFORD RUBBER WORKS COMPANY, PETITIONER, *v.* METALLIC RUBBER TIRE COMPANY. January 13, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Livingston Gifford* for the petitioner. *Mr. Norman Johnson* for the respondent.

No. 908. CHARLES GRING, OWNER, ETC., PETITIONER, *v.* ROSA LEE CHERRY, ADMINISTRATRIX, ET AL. January 13, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Howard M. Long, Mr. J. Parker Kirlin* and *Mr. Edward R. Baird, Jr.*, for the petitioner. *Mr. Henry Bowden* for the respondent.

No. 909. ROYAL BOSWORTH YOUNG ET AL., PETITIONERS, *v.* UNITED ZINC COMPANIES ET AL. January 13, 1913. Petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Lewis Marks* and *Mr. R. B. Young* for the petitioners. *Mr. Samuel Williston* and *Mr. Hollis R. Bailey* for the respondents.

No. 910. J. G. BRILL COMPANY, PETITIONER, *v.* THE BEMIS CAR BOX COMPANY. January 13, 1913. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Edgar Bull, Mr. Alexander Simpson, Jr.*, and *Mr. Francis Rawle* for the petitioner. *Mr. John G. Johnson, Mr. Henry P. Brown* and *Mr. Antonio Knauth* for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 14, 1912, TO JANUARY 13, 1913.

No. 26. NORTHERN INDIANA GAS & ELECTRIC CO., APPELLANT, *v.* THE MAYOR AND BOARD OF PUBLIC WORKS OF THE CITY OF HAMMOND, IND., ET AL. Appeal from the Circuit Court of the United States for the District of Indiana. October 14, 1912. Dismissed per stipulation, and cause remanded to the District Court of the United States for the District of Indiana. *Mr. Max Pam* for the appellant. *Mr. Edward F. Colladay* for the appellees.

No. 133. ST. LOUIS & SAN FRANCISCO R. R. CO., PLAINTIFF IN ERROR, *v.* WILLIAM HEYSER. In error to the Supreme Court of the State of Arkansas. October 14, 1912. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. W. F. Evans* for the plaintiff in error. No appearance for the defendant in error.

No. 183. THE ATCHISON, TOPEKA & SANTA FE RY. CO., PLAINTIFF IN ERROR, *v.* I. A. TACK. In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas. October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Gardiner Lathrop, Mr. J. W. Terry* and *Mr. A. H. Culwell* for the plaintiff in error. *Mr. George E. Wallace* for the defendant in error.

No. 227. NORTH RIVER INSURANCE CO., PLAINTIFF IN ERROR, *v.* W. B. HIGSON. In error to the Supreme Court

of the State of North Carolina. October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Charles W. Tillett* for the plaintiff in error. No appearance for the defendant in error.

No. 228. FIDELITY TRUST CO., APPELLANT, *v.* LON H. GASKELL, RECEIVER. In error to the District Court of the United States for the Western District of Missouri. October 14, 1912. Dismissed with costs, per stipulation. *Mr. Frank Hagerman* and *Mr. Justin D. Bowersock* for the appellant. *Mr. John M. Cleary* for the appellee.

No. 233. THE UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF NEBRASKA. In error to the Supreme Court of the State of Nebraska. October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Charles J. Greene* and *Mr. Ralph W. Breckenridge* for the plaintiff in error. *Mr. Grant G. Martin* and *Mr. W. T. Thompson* for the defendant in error.

No. 317. ST. LOUIS & SAN FRANCISCO R. R. CO., PLAINTIFF IN ERROR, *v.* CASSIE KITCHEN. In error to the Supreme Court of the State of Arkansas. October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. W. F. Evans* and *Mr. E. T. Miller* for the plaintiff in error. No appearance for the defendant in error.

No. 569. THE CENTRAL R. R. CO. OF NEW JERSEY, PLAINTIFF IN ERROR, *v.* MICHAEL COLASURDO. In error to the United States Circuit Court of Appeals for the Second Circuit. October 14, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Robert Thorne* for the plaintiff in error. No appearance for the defendant in error.

No. 599. BERNARD HAAS, BY SADIE HAAS, HIS GUARDIAN AD LITEM, ET AL., APPELLANTS, *v.* GREYSTOKE CASTLE S. S. CO. (LTD.), ETC. Appeal from the District Court of the United States for the Northern District of California. October 14, 1912. Dismissed with costs, on motion of counsel for the appellants. *Mr. E. B. McClanahan* and *Mr. Charles T. Tittmann* for the appellants. *Mr. J. Parker Kirlin* for the appellee.

No. 712. THE GREAT NORTHERN RY. CO., PETITIONER, *v.* WAYLAND SLOAN ET AL., MINORS, ETC. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. October 14, 1912. Dismissed, on motion of counsel for the petitioner. *Mr. E. C. Lindlay* and *Mr. Charles S. Albert* for the petitioner. No appearance for the respondents.

No. 6. ANTONIO JOAQUÍN LUIS SANCHEZ DE LARRAGOITI ET AL., PLAINTIFFS IN ERROR, *v.* SALVADOR CASTELLO ET AL. In error to the District Court of the United States for Porto Rico. October 24, 1912. Dismissed with costs, pursuant to the nineteenth rule. *Mr. James Byrne*, *Mr. Hugo Kohlmann* and *Mr. Francis H. Dexter* for the

plaintiffs in error. No appearance for the defendants in error.

No. 21. SAMUEL LOEB, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Court of Appeals of the State of Georgia. October 30, 1912. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Thomas S. Felder* for the defendant in error. No appearance for the plaintiff in error. *Mr. Thos. S. Felder* for the defendant in error.

No. 547. THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL., PLAINTIFFS IN ERROR, *v.* VALENTINA CHAVES DE PADILLA. In error to the Supreme Court of the Territory of New Mexico. November 4, 1912. Dismissed with costs, per stipulation, and cause remanded to the Supreme Court of the State of New Mexico. *Mr. Robert Dunlap* for the plaintiffs in error. No appearance for the defendant in error.

No. 4. M. KAHN & BROTHER, PLAINTIFF IN ERROR, *v.* J. F. BLEDSOE, TRUSTEE, ETC. In error to the Supreme Court of the State of Oklahoma. November 4, 1912. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. Evans Browne* in behalf of counsel for the defendant in error. *Mr. William F. Bowman* for the plaintiff in error. *Mr. S. T. Bledsoe* for the defendant in error.

No. 125. THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* CLARENCE C. GRAY.

In error to the Supreme Court of the State of Minnesota. November 11, 1912. Dismissed with costs on authority of counsel for the plaintiff in error. *Mr. W. H. Bremner* for the plaintiff in error. No appearance for the defendant in error.

No. 747. A. W. MORSE, PLAINTIFF IN ERROR, *v.* THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY. In error to the District Court of the United States for the Northern District of Texas. November 13, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. William H. Atwell* for the plaintiff in error. No appearance for the defendant in error.

No. 780. G. L. CRENSHAW, APPELLANT, *v.* CARROLL ALLEN, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FRED DORR, BANKRUPT. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. November 15, 1912. Dismissed, each party paying his own costs, per stipulation. *Mr. William B. Mathews* for the appellant. *Mr. James H. Shankland* for the appellee.

No. 5, Original. THE UNITED STATES OF AMERICA, COMPLAINANT, *v.* THE PEOPLE OF THE STATE OF NEW YORK ET AL. December 2, 1912. Dismissed without prejudice on motion of *Mr. Solicitor General Bullitt* for the complainant. *The Attorney General* for the complainant. *Mr. James M. Hunt* for the defendants.

No. 793. MARIUS CALMELS, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC.;

No. 794. VICTOR VINOL, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC.;

No. 795. LEOPOLD CALMELS, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC.;

No. 796. MARIA LOUISE CALMELS, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC.; and

No. 797. VALERIE CALMELS, APPELLANT, *v.* SAMUEL W. BACKUS, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the District Court of the United States for the Northern District of California. December 2, 1912. Dismissed with costs, on motion of *Mr. Corry M. Stadden* for the appellants. *Mr. Corry M. Stadden* for the appellants. *The Attorney General* for the appellees.

No. 88. GASPAR CUE ET AL., APPELLANTS, *v.* WILLIAM C. COTTON ET AL., EXECUTORS, ETC., ET AL. Appeal from the Circuit Court of the United States for the Western District of Texas. December 9, 1912. Dismissed with costs, pursuant to the tenth rule, and cause remanded to the District Court of the United States for the Western District of Texas. *Mr. A. Seymour Thurmond* for the appellants. No appearance for the appellees.

No. 94. ED BROWN ET AL., PLAINTIFFS IN ERROR, *v.* FRANK M. POWERS, JUDGE, ET AL. In error to the Supreme Court of the State of Iowa. December 13, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Benjamin I. Salinger* for the plaintiffs in error. No appearance for the defendants in error.

No. 95. ED BROWN ET AL., PLAINTIFFS IN ERROR, *v.* FRANK M. POWERS, JUDGE, ET AL. In error to the Supreme Court of the State of Iowa. December 13, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Benjamin I. Salinger* for the plaintiffs in error. No appearance for the defendants in error.

No. 267. FRANK F. LAMB, PLAINTIFF IN ERROR, *v.* SAMUEL B. BAKER. In error to the Supreme Court of the State of Oklahoma. December 18, 1912. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. George S. Ramsay* for the plaintiff in error. No appearance for the defendant in error.

No. 110. SEABOARD FIRE & MARINE INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* GUSTAVE MONTELEONE. In error to the Supreme Court of the State of Louisiana. December 19, 1912. Dismissed with costs, per stipulation. *Mr. Edgar H. Farrar* for the plaintiff in error. *Mr. Benjamin Rice Forman* and *Mr. Anthony J. Rossi* for the defendant in error.

No. 114. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MICHAEL KILEY. In error to the Supreme Court of the State of Wisconsin. December 19, 1912. Dismissed with costs, pursuant to the tenth rule. *Mr. Burton Hanson* and *Mr. C. H. Van Alstine* for the plaintiff in error. No appearance for the defendant in error.

No. 117. JOHN H. HALL, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Circuit Court of the United States for the District of Oregon. January 6, 1913. Dismissed, on motion of *Mr. Solicitor General Bullitt* for the defendant in error, and cause remanded to the District Court of the United States for the District of Oregon. *Mr. John H. Hall* for the plaintiff in error. *The Attorney General* for the defendant in error.

No. 548. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* NORTHERN COMMERCIAL COMPANY. In error to the District Court of the United States for the Fourth Division, Territory of Alaska. January 6, 1913. Dismissed, on motion of *Mr. Solicitor General Bullitt* for the plaintiff in error. *The Attorney General* for the plaintiff in error. *Mr. Edward M. Cleary* and *Mr. John Sidney Webb* for the defendant in error.

No. 182. AUGUSTUS BURGDORF, SURVIVING TRUSTEE, ET AL., APPELLANTS, *v.* LEMUEL E. MAYHEW. Appeal from the Court of Appeals of the District of Columbia. January 6, 1913. Dismissed with costs, on motion of counsel for the appellant. *Mr. John Ridout* for the appellants. No appearance for the appellee.

No. 315. GERMAN INSURANCE COMPANY, PLAINTIFF IN ERROR, *v.* COMMONWEALTH OF KENTUCKY, FOR THE USE, ETC., OF THE LOUISVILLE SCHOOL BOARD ET AL. In error to the Court of Appeals of the State of Kentucky. January 6, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Louis B. Wehle* and *Mr. O.*

H. Wehle for the plaintiff in error. No appearance for the defendants in error.

No. 210. St. Louis Fair Association, Plaintiff in Error, *v.* Gilsonite Roofing & Paving Company. In error to the Supreme Court of the State of Missouri. January 13, 1913. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Henry W. Bond* and *Mr. Thomas Bond* for the plaintiff in error. No appearance for the defendant in error.

CASES DISPOSED OF IN VACATION.

No. 329. Louis F. Braun, Appellant, *v.* Lindsay Russell, Trustee, et al. Appeal from the United States Circuit Court of Appeals for the second circuit. July 12, 1912. Dismissed pursuant to the 28th Rule. *Mr. Dix W. Noel* for the appellant. *Mr. Daniel P. Hays* for the appellees.

No. 330. Walter Bamford, Appellant, *v.* Lindsay Russell, Trustee, et al. Appeal from the United States Circuit Court of Appeals for the Second Circuit. July 12, 1912. Dismissed pursuant to the 28th Rule. *Mr. Dix W. Noel* for the appellant. *Mr. Daniel P. Hays* for the appellees.

No. 331. Lindsay Russell, Trustee, Appellant, *v.* Walter Bamford and Louis F. Braum. Appeal from the United States Circuit Court of Appeals for the Second Circuit. July 12, 1912. Dismissed pursuant to the 28th

Rule. *Mr. Daniel P. Hays* for the appellant. *Mr. Dix W. Noel* for the appellees.

No. 96. WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR, *v.* NANCY E. GILKINSON. In error to the Appellate Court of the State of Indiana. July 31, 1912. Dismissed pursuant to the 28th Rule. *Mr. Samuel O. Pickens, Mr. Robert Franklin Davidson, Mr. George H. Fearons, Mr. Rush Taggart* and *Mr. Francis Raymond Stark* for the plaintiff in error. *Mr. Charles W. Hiller* for the defendant in error.

No. 328. AMERICAN REALTY COMPANY, PLAINTIFF IN ERROR, *v.* LEAH A. THOMPKINS. In error to the Court of Appeals of the District of Columbia. September 17, 1912. Dismissed pursuant to the 28th Rule. *Mr. Milton Strasburger* for the plaintiff in error. *Mr. Alexander Wolf* and *Mr. J. J. Darlington* for the defendant in error.

No. 235. MONETT ELECTRIC LIGHT, POWER & ICE CO., APPELLANT, *v.* CITY OF MONETT, MISSOURI. Appeal from the Circuit Court of the United States for the Western District of Missouri. October 10, 1912. Dismissed pursuant to the 28th Rule. *Mr. Joseph M. Hill, Mr. James Brizzolara* and *Mr. H. L. Fitzhugh* for the appellant. *Mr. John M. Wood* for the appellee.

APPENDIX

The contents and pagination of the Equity Rules as published in this Appendix are identical with the Equity Rules as originally published in pamphlet form by the Clerk of the Supreme Court of the United States.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY

OF THE

UNITED STATES

Promulgated by the

SUPREME COURT OF THE UNITED STATES

November 4, 1912.

SUPREME COURT OF THE UNITED STATES

MONDAY, NOVEMBER 4, 1912.

Present: The CHIEF JUSTICE, Mr. JUSTICE MCKENNA, Mr. JUSTICE HOLMES, Mr. JUSTICE DAY, Mr. JUSTICE LURTON, Mr. JUSTICE HUGHES, Mr. JUSTICE VAN DEVANTER, Mr. JUSTICE LAMAR, and Mr. JUSTICE PITNEY.

Order: It is now here ordered by the court that the rules of practice for the courts of equity of the United States this day adopted and established by the court be, and the same are hereby, promulgated as such, to be in force on and after February 1, 1913.

The Chief Justice said:

"The court, in announcing the adoption of the new rules, expresses its appreciation of the interest in the subject manifested generally by the judges of the courts of the United States, and especially by the judges of the circuit courts of appeals, in appointing bar committees from their respective circuits to consider and make recommendations upon the subject. The result of the intelligent and careful labors of such committees embodied in the reports which they made, as well as the interest shown by the entire bar and the many individual suggestions which came to the court, greatly facilitated the performance of the duty of framing the new rules.

"The court also desires to record its appreciation of the courtesy shown by the Lord Chancellor of England in replying in writing to certain questions concerning the practical operation of the English chancery rules submitted to him by Mr. Justice Lurton while he was in England for the purpose of observing such operation."

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RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES

Rule 1.

DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES—ORDERS AT CHAMBERS.

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

2.

CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.

The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

3.

BOOKS KEPT BY CLERK AND ENTRIES THEREIN.

The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

4.

NOTICE OF ORDERS.

Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

5.

MOTIONS GRANTABLE OF COURSE BY CLERK.

All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso;* and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

6.

MOTION DAY.

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

7.

PROCESS, MESNE AND FINAL.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to

appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

ENFORCEMENT OF FINAL DECREES.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

9.

WRIT OF ASSISTANCE.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10.

DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.

In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

11.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

12.

ISSUE OF SUBPŒNA—TIME FOR ANSWER.

Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.

13.

MANNER OF SERVING SUBPŒNA.

The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

14.

ALIAS SUBPŒNA.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.

15.

PROCESS, BY WHOM SERVED.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.

It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*

17.

DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.

When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso,* and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

18.

PLEADINGS—TECHNICAL FORMS ABROGATED.

Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

19.

AMENDMENTS GENERALLY.

The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

20.

FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.

A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

21.

SCANDAL AND IMPERTINENCE.

The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

22.

ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.

If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

23.

MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.

If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

24.

SIGNATURE OF COUNSEL.

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

25.

BILL OF COMPLAINT—CONTENTS.

Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

26.

JOINDER OF CAUSES OF ACTION.

The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds

must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

27.

STOCKHOLDER'S BILL.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

28.

AMENDMENT OF BILL AS OF COURSE.

The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

29.

DEFENSES—HOW PRESENTED.

Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and

may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

30.

ANSWER—CONTENTS—COUNTER-CLAIM.

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

31.

REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.

Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten

days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

32.

ANSWER TO AMENDED BILL.

In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer.

33.

TESTING SUFFICIENCY OF DEFENSE.

Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

34.

SUPPLEMENTAL PLEADING.

Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

35.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

36.

OFFICERS BEFORE WHOM PLEADINGS VERIFIED.

Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court

of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

37.

PARTIES GENERALLY—INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

38.

REPRESENTATIVES OF CLASS.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

39.

ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.

In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

40.

NOMINAL PARTIES.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

41.

SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

42.

JOINT AND SEVERAL DEMANDS.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

43.

DEFECT OF PARTIES—RESISTING OBJECTION.

Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

44.

DEFECT OF PARTIES—TARDY OBJECTION.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

45.

DEATH OF PARTY—REVIVOR.

In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

46.

TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—RULINGS ON OBJECTIONS TO EVIDENCE.

In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

47.

DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.

The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of

named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

48.

TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES.

In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

49.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reducing to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

50.

STENOGRAPHER—APPOINTMENT—FEES.

When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be

fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

51.

EVIDENCE TAKEN BEFORE EXAMINERS, ETC.

Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

52.

ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER OR EXAMINER.

Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by

counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

53.

NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC.

Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

54.

DEPOSITIONS UNDER REV. STAT., §§ 863, 865, 866, 867—CROSS-EXAMINATION.

After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

55.

DEPOSITION DEEMED PUBLISHED WHEN FILED.

Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

56.

ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.

After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

57.

CONTINUANCES.

After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

58.

DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory

shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

59.

REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.

Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

60.

PROCEEDINGS BEFORE MASTER.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to

assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

61.

MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.

In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

62.

POWERS OF MASTER.

The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

63.

FORM OF ACCOUNTS BEFORE MASTER.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other

parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

64.

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.

All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

65.

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

66.

RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.

The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

67.

COSTS ON EXCEPTIONS TO MASTER'S REPORT.

In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

68.

APPOINTMENT AND COMPENSATION OF MASTERS.

The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

69.

PETITION FOR REHEARING.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

70.

SUITS BY OR AGAINST INCOMPETENTS.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

71.

FORM OF DECREE.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master,

nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

72.

CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

73.

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

74.

INJUNCTION PENDING APPEAL.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took

part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

75.

RECORD ON APPEAL—REDUCTION AND PREPARATION.

In case of appeal:

(*a*) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *præcipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *præcipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(*b*) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *præcipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then

be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(*c*) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

76.

RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS—CORRECTION OF OMISSIONS.

In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

77.

RECORD ON APPEAL—AGREED STATEMENT.

When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

78.

AFFIRMATION IN LIEU OF OATH.

Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

79.

ADDITIONAL RULES BY DISTRICT COURT.

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

80.

COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.

When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

81.

THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES ABROGATED.

These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

SUPREME COURT OF THE UNITED STATES.

THURSDAY, OCTOBER 31, 1912.

Present: The Chief Justice, Mr. Justice McKENNA, Mr. Justice HOLMES, Mr. Justice DAY, Mr. Justice LURTON, Mr. Justice HUGHES, Mr. Justice VAN DEVANTER, Mr. Justice LAMAR, and Mr. Justice PITNEY.

Mr. Assistant to the Attorney General Fowler addressed the court as follows:

"May it please the Honorable Court:

"I deeply regret the necessity of performing the sorrowful duty of announcing to this honorable court the death of the Hon. James Schoolcraft Sherman, Vice President of the United States.

"Through many years of active and valuable public service, Mr. Sherman had attained, independent of the office which he occupied, an enviable position in the hearts of his countrymen.

"Out of respect deemed to be due so exalted a position in a coordinate branch of the Government, and that this honorable body may join with a bereaved Nation in expressing its sorrow at his untimely death, I move that this court do now adjourn until after the funeral."

The Chief Justice responded:

"Mr. Attorney General:

"The court hears with sorrow the announcement which you make of the death of the Vice President, and as a token of our participation in the burden of loss which the country has suffered, and out of sympathy with his countrymen, the motion you present is granted and the court will stand adjourned until Monday next."

Adjourned until Monday next at 12 o'clock.

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ACCOUNTS AND ACCOUNTING.

See ARMY AND NAVY, 1.

ACTIONS.

1. *On contracts; who may maintain.*

Guardian Trust Co. v. *Fisher* did not overrule *National Bank* v. *Grand Lodge*, 98 U. S. 124, holding that a third person cannot sue for the breach of a contract to which he is a stranger unless in privity with the parties and is therein given a direct interest. *German Alliance Ins. Co.* v. *Home Water Co.*, 220.

2. *On contract between municipality and corporation for supplying water; right of taxpayer to maintain.*

In *Guardian Trust Co.* v. *Fisher*, 200 U. S. 57, the contract with the water company expressly provided for liability of the company to third parties, and the state court having held that, under the law of North Carolina, an action of this nature can be maintained, that question was not in issue in this court. *Ib.*

3. *Same.*

While a diversity of opinion exists, a majority of the American courts hold that the taxpayer has no such direct interest in an agreement between the municipality and a corporation for supplying water as will allow him to sue either *ex contractu* for breach, or *ex delicto* for violation, of the public duty thereby assumed. *Ib.*

4. *Same.*

In this case *held* that a taxpayer has no claim against a water supply company for damages resulting from a failure of the company to perform the contract with the municipality. *Ib.*

See ALIENS, 2;
BANKRUPTCY, 2;
CONSTITUTIONAL LAW, 12, 14;
CONTRACTS, 10, 11, 12;
EMPLOYERS' LIABILITY ACT, 1;
PURE FOOD AND DRUGS ACT, 1;
RESTRAINT OF TRADE, 16;
RIPARIAN RIGHTS, 3.

ACTS OF CONGRESS.

ALIENS.—Act of Feb. 20, 1907, § 3, 34 Stat. 898 (see Constitutional Law, 14): *Zakonaite* v. *Wolf*, 272.

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ARMY AND NAVY.—Act of Feb. 24, 1905, 33 Stat. 806 (see Army and Navy, 1): *McLean* v. *United States*, 374. Navy Personnel Act of March 3, 1899, § 13, 30 Stat. 1004 (see Army and Navy, 4, 5): *Hannum* v. *United States*, 436. Rev. Stat., § 1454 (see Army and Navy, 4): *Ib.*

BANKRUPTCY.—Act of Feb. 5, 1903, § 8, 32 Stat. 797 (see Bankruptcy, 2): *Wood* v. *Wilbert*, 384. Act of July 1, 1898, § 7, 30 Stat. 544 (see Bankruptcy, 1): *Miller* v. *Guasti*, 170.

CLAIMS AGAINST UNITED STATES.—Act of June 21, 1906, 34 Stat. 325 (see Court of Claims, 1): *Robertson* v. *Gordon*, 311.

CRIMINAL LAW.—Rev. Stat., § 1025 (see Criminal Law, 4): *Breese* v. *United States*, 1.

EMPLOYERS' LIABILITY ACT.—(See Employers' Liability Act): *Missouri, K. & T. Ry. Co.* v. *Wulf*, 570.

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FULL FAITH AND CREDIT.—Rev. Stat., § 905 (see Courts, 2): *Thompson* v. *Thompson*, 551.

INTERSTATE COMMERCE.—Act of June 18, 1910, § 7, 36 Stat. 539 (see Interstate Commerce Commission, 2, 3): *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 14. Hepburn Act of June 29, 1906, 34 Stat. 584 (see Interstate Commerce, 3, 8, 10, 16, 17, 19, 23): *Adams Express Co.* v. *Croninger*, 491; *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 426. Elkins Act of Feb. 19, 1903, 32 Stat. 847 (see Interstate Commerce, 6, 10): *United States* v. *Union Stock Yard Co.*, 286. Wilson Act of Aug. 8, 1890, 26 Stat. 313 (see Intoxicating Liquors, 4): *Purity Extract Co.* v. *Lynch*, 192.

JUDICIARY.—Code of 1911, § 291 (see Courts, 3, 4; Statutes, A 5): *Ex parte United States*, 420. Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (see Jurisdiction, A 5, 7): *United States* v. *Patten*, 525. Expedition Act of 1903, § 291 (see Courts, 3, 5, 6; Statutes, A 5): *Ex parte United States*, 420. Act of March 3, 1897, § 6, 26 Stat. 826 (see Jurisdiction, A 4): *Missouri, K. & T. Ry. Co.* v. *Wulf*, 570. Act of Feb. 9, 1893, 27 Stat. 434 (see Jurisdiction, A 2): *Thompson* v. *Thompson*, 551. Act of March 3, 1891, § 5, 26

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MAILS.—Act of March 3, 1901, 31 Stat. 1099 (see Mails, 8): *Smith* v. *Hitchcock*, 53. Act of July 13, 1892, 27 Stat. 145 (see Mails, 1): *Beach* v. *United States*, 243. Act of March 3, 1879, 20 Stat. 355 (see Mails, 4, 5, 6, 7): *Smith* v. *Hitchcock*, 53.

PUBLIC LANDS.—Act of June 3, 1878, 20 Stat. 88 (see Public Lands, 1): *Bunker Hill Mining Co.* v. *United States*, 548. Swamp Land Act of Sept. 28, 1850, 9 Stat. 519 (see Riparian Rights, 2): *Marshall Dental Mfg. Co.* v. *Iowa*, 460.

PUBLIC OFFICERS.—Rev. Stat., § 1765 (see Claims Against United States, 2): *Evans* v. *United States*, 567.

PURE FOOD AND DRUGS ACT.—Act of June 30, 1906, § 10, 34 Stat. 768 (see Pure Food and Drugs Act): *443 Cans of Egg Product* v. *United States*, 172.

RAILROADS.—Act of July 2, 1864, 13 Stat. 356 (see Railroads, 3; Restraint of Trade, 30): *United States* v. *Union Pacific R. R. Co.*, 61. Act of July 1, 1862, 12 Stat. 489 (see Railroads, 3; Restraint of Trade, 30): *Ib.*

TELEGRAPH COMPANIES.—Act of July 24, 1866, 14 Stat. 221 (see Telegraph Companies, 2, 3): *Williams* v. *Talladega*, 404.

ALIENS.

1. *Deportation; authority of Congress to impose conditions upon continued residence of.*

The authority of Congress to prohibit aliens from coming within the United States includes the authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the country depends. *Zakonaite* v. *Wolf*, 272.

2. *Deportation; nature of proceeding to enforce regulations relative to continued residence of.*

A proceeding to enforce regulations under which aliens may continue to reside within the United States is not a criminal proceeding within the meaning of the Fifth and Sixth Amendments. *Ib.*

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 14;
COURTS, 8.

ALIMONY.

See CONSTITUTIONAL LAW, 38;
DIVORCE, 1.

AMENDMENT OF PLEADING.

See EMPLOYERS' LIABILITY ACT, 1, 3.

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Fifth. *See* ALIENS, 2;
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Fourteenth. *See* CONSTITUTIONAL LAW, 8, 18, 19, 21, 22, 33, 39, 40, 44.

Sixth. *See* ALIENS, 2;
CONSTITUTIONAL LAW, 14.

AMOUNT IN CONTROVERSY.

See JURISDICTION, A 1, 2, 3.

ANTI-TRUST ACT.

See COURTS, 5, 6;
RAILROADS, 2;
RESTRAINT OF TRADE.

APPEAL AND ERROR.

1. *Application of § 1011, Rev. Stat.*

Rev. Stat., § 1011, providing that there shall be no reversal in this court upon a writ of error for error in ruling any plea of abatement other than one to the jurisdiction of the court, does not apply to writs of error to state courts but only to lower Federal courts. *Bucks Stove Co.* v. *Vickers*, 205.

2. *Delay; when prosecution of writ deemed for purpose of.*

The unsubstantial and frivolous character of the only Federal question presented in this case embraces the conclusion that the writ was prosecuted for delay. *Deming* v. *Carlisle Packing Co.*, 102.

3. *Delay; award of damages on dismissal of frivolous writ.*

Under Rule 23, which is based on § 1011, Rev. Stat., this court has the same power to award damages for delay where the writ of error is dismissed as where there is judgment of affirmance; and in this case five per cent. damages are imposed in addition to costs. *Ib.*

4. *Direct appeal under § 5 of act of 1891; essentials to right.*
In order to warrant a direct appeal to this court under § 5 of the Court of Appeals Act of 1891, the jurisdiction of the Federal court as such must be involved. *Keatley* v. *Furey*, 399.

5. *Direct appeal under act of 1891; when jurisdiction of Federal court involved.*
Whether title to the assets outside the State passed to a receiver of a corporation under an order of the court in the State of organization depends upon the law of that State, and a decision by a Federal court in another State having custody of assets through a receiver that no title passed and dismissing a petition of the first named receiver to intervene, does not involve the question of jurisdiction of the Federal court and warrant a direct appeal to this court. *Ib.*

6. *Direct appeal under act of 1891; correctness of certificate.*
In such a case the judge denying the petition to intervene is right in certifying that no question of jurisdiction exists. *Ib.*

7. *Direct appeal under act of 1891; when question of jurisdiction of lower court open.*
In such a case the Federal court has jurisdiction over the intervention whether it has jurisdiction as a Federal court of the principal case or not; and until final decree in the principal case the question of jurisdiction is not open. *Ib.*

8. *Dismissal of writ on showing, by evidence outside the record, death of party against whom mandamus sought.*
Where it appears, although by evidence outside the record, that before the writ of error to the state court was sued out, the public officer against whom a writ of mandamus is prayed had died, and his successor had qualified, the writ will be dismissed. *Florida* v. *Croom*, 309.

9. *Findings below; binding effect of; quære as to.*
Quære whether parties are bound in a higher court by findings based on specific investigations made by the lower tribunal without notice. (See *Oregon R. R. Co.* v. *Fairchild*, 224 U. S. 510, 525.) *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 14.

10. *From Philippine Islands; how suit to recover real estate brought.*
A suit to recover real estate, like an ordinary action at law, can only be brought to this court from the Supreme Court of the Philippine Islands by writ of error; it cannot be brought by appeal. *Harty* v. *Victoria*, 12.

11. *From Philippine Islands; scope of review.*
Where, as in this case, there is no question of law, this court cannot, on writ of error, review the finding of the Supreme Court of the Philippine Islands that the preponderance of contradictory evidence was on the defendant's side. *Ib.*

12. *Writ of error to territorial court; questions open on.*
On writ of error to a territorial court only such questions are before this court as can be raised upon writ of error to a state court. *Toyota* v. *Hawaii*, 184.

See HABEAS CORPUS;
JURISDICTION;
PURE FOOD AND DRUGS ACT, 1, 4.

APPEARANCE.

See JURISDICTION, H 1.

APPROPRIATIONS.

See ARMY AND NAVY, 2.

ARBITRATION AND AWARD.

Substitution of arbitrators.
Where an agreement to leave a dispute as to amounts due under a contract to certain third parties provides that in case of their refusal to act no rights are affected, it is not permissible after such a refusal to bring in an attempt of another tribunal to adjudicate the claim. *Robertson* v. *Gordon*, 311.

ARMY AND NAVY.

1. *Accounting officers; nature of duties; jurisdiction of Court of Claims under act of February 24, 1905.*
Under the act of Congress of February 24, 1905, 33 Stat. 806, c. 777, directing the accounting officers to settle and adjust all back pay and emoluments that would have been due to an officer had he remained in the army for a period that he was out of the army after an enforced resignation from that time until his reinstatement *held* that, under such a statute the duties of accounting officers are administrative and not judicial, and as to whatever rights arose under the act as to its construction, the Court of claims had jurisdiction to determine. *McLean* v. *United States*, 374.

2. *Relief of officer; act of February 24, 1905, construed.*
Public moneys are not appropriated as mere gifts and such an act will not be regarded as a simple gratuity. *Ib.*

3. *Same.*

The words "all back pay and emoluments" include forage, rations, and pay for servants to which the officer would have been entitled under the statutes had he remained in the army, and in adjusting under the statute those items should not have been excluded because the officer was not actually in service of the United States. *Ib.*

4. *Navy Personnel Act of 1899; application of assimilating clause of § 13.*

The assimilating clause of § 13 of the Navy Personnel Act of 1899 applies only to officers on the active list and does not repeal the prior laws respecting the pay of officers compulsorily retired under § 1454, Rev. Stat., for incapacity not resulting from any incident of the service. *Hannum* v. *United States*, 436.

5. *Navy Personnel Act of 1899; intent of Congress as to standards of retirement.*

The Personnel Act emphasizes the plain intent of Congress not to destroy the then existing standards of retirement for Navy officers, but to retain and add to those standards as distinguished from the standards of retirement fixed for the Army. *Ib.*

ATTORNEYS.

See CONTRACTS, 13, 14, 15;
COURT OF CLAIMS, 1.

AUCTIONS.

See FEDERAL QUESTION, 1.

BANKRUPTCY.

1. *Discharge; effect to bar debt where creditors without notice.*

A debt of the bankrupt not properly scheduled as required by § 7 of the Bankruptcy Act is not barred by the discharge if the creditors had no notice or actual knowledge of the proceeding. *Miller* v. *Guasti*, 170.

2. *Jurisdiction of District Court of suit by trustee.*

The District Court has not jurisdiction in behalf of the trustee in bankruptcy to recover assets of the bankrupt from a third person under a revocatory action allowed under the law of Louisiana, of an insolvent, without the consent of the defendant, under the Bankruptcy Act as amended by the act of February 5, 1903, c. 487, § 8, 32 Stat. 797. *Wood* v. *Wilbert*, 384.

3. *Preferences; effect of adjudication on title of purchaser of perishable property at attachment sale within four months.*
A *bona fide* purchaser for value of perishable property held under attachment at a sale made by order of the local court gets a good title notwithstanding bankruptcy proceedings had been instituted within four months after the attachment and had proceeded to adjudication before the sale. *Jones* v. *Springer*, 148.

4. *Preferences; effect of sale of perishable property held under attachment.*
An order for sale of perishable property held under attachment, made by the local court within the terms of the local act, will not be set aside by this court. *Ib.*

5. *Preferences; effect of sale of perishable property under local statute.*
Even if the local statute permitting sales of perishable property held in *custodia legis* be broader than General Order XVIII, 3, this court will not for that reason only set aside a sale made by the local court if within the terms of the local act. *Ib.*

6. *Sales of perishable property held under attachment; validity of.*
A local court having the custody under attachment of perishable goods may order a sale if necessary to protect and it is not necessary that such sale be made under General Order XVIII, 3, in order to validate it. *Ib.*

See PRACTICE AND PROCEDURE, 6.

BILLS OF LADING.

See INTERSTATE COMMERCE, 8, 19.

BOOKS.

See CORPORATIONS;
MAILS, 7.

BREAD LOAVES.

See CONSTITUTIONAL LAW, 17;
STATES, 2.

BUILDING LINES.

See CONSTITUTIONAL LAW, 15, 43, 44.

BURDEN OF PROOF.

See PRACTICE AND PROCEDURE, 9.

CARMACK AMENDMENT.

See INTERSTATE COMMERCE, 8, 19, 23.

CARRIERS.

1. *Duties respecting transportation of live stock; beginning and ending of.*

The duties of a common carrier in the transportation of live stock begin with their delivery to be loaded and end only after unloading and delivery, or offer of delivery, to the consignee. (*Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128.) *United States* v. *Union Stock Yard Co.*, 286.

2. *Negligence; right of carrier to exempt itself therefor; right of carrier to contract for compensation commensurate with risks involved.*

A common carrier cannot exempt himself from liability for his own negligence or that of his employés, but the rigor of this rule may be modified by a fair, reasonable and just agreement with the shipper which does not include exemption from such negligence; and the right to receive compensation commensurate with the risk involves the right to agree upon rates proportionate with the value of the property transported. *Adams Express Co.* v. *Croninger*, 491.

See CONSTITUTIONAL LAW, 21;
INTERSTATE COMMERCE, 3, 4, 5;
STATES, 3.

CASES APPROVED.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Lindeman*, 143 Fed. Rep. 946, approved in *Southwestern Brewery* v. *Schmidt*, 162.

Polson v. *Stewart*, 167 Massachusetts, 211, approved in *Selover, Bates & Co.* v. *Walsh*, 112.

CASES DISTINGUISHED.

Bement v. *National Harrow Co.*, 186 U. S. 70, distinguished in *Standard Sanitary Mfg. Co.* v. *United States*, 20.

Chicago, Milwaukee & St. Paul Ry. v. *Solan*, 169 U. S. 133, distinguished in *Adams Express Co.* v. *Croninger*, 491.

Hanley v. *Kansas City Southern Railway* 187 U. S. 617, distinguished in *Ewing* v. *Leavenworth*, 464.

Henry v. *A. B. Dick Co.*, 224 U. S. 1, distinguished in *Standard Sanitary Mfg. Co.* v. *United States*, 20.

Pennsylvania Railroad v. *Hughes*, 191 U. S. 477, distinguished in *Adams Express Co.* v. *Croninger*, 491.

Spraigue v. *Thompson*, 118 U. S. 90, distinguished in *Darnell* v. *Indiana*, 390.

Union Pacific Ry. Co. v. *Wyler*, 158 U. S. 285, distinguished in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 570.

Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, distinguished in *Williams* v. *Talladega*, 404.

CASES EXPLAINED.

Guardian Trust Co. v. *Fisher*, 200 U. S. 57, explained in *German Alliance Ins. Co.* v. *Home Water Co.*, 220.

Standard Oil Co. v. *United States*, 221 U. S. 1, explained in *United States* v. *Union Pacific R. R. Co.*, 61.

United States v. *American Tobacco Co.*, 221 U. S. 106, explained in *United States* v. *Union Pacific R. R. Co.*, 61.

CASES FOLLOWED.

Adams Express Co. v. *Croninger*, 226 U. S. 491, followed in *Chicago, B. & Q. Ry. Co.* v. *Miller*, 513, and *Chicago, St. P., M. & O. Ry. Co.* v. *Latta*, 519.

Aikens v. *Wisconsin*, 195 U. S. 206, followed in *United States* v. *Reading Co.*, 324.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, followed in *Kansas City* v. *Kansas*, 599.

American Sugar Refining Co. v. *United States*, 211 U. S. 155, followed in *National Telephone Mfg. Co.* v. *American Bell Telephone Co.*, 600.

Appleby v. *Buffalo*, 221 U. S. 524, followed in *F. B. Williams Cypress Co.* v. *Louisiana*, 603.

Atherton v. *Atherton*, 181 U. S. 155, followed in *Thompson* v. *Thompson*, 551.

Bates & Guild Co. v. *Payne*, 194 U. S. 106, followed in *Smith* v. *Hitchcock*, 53.

Bernheimer v. *Converse*, 206 U. S. 516, followed in *National Surety Co.* v. *Architectural Co.*, 276.

Billings v. *Illinois*, 188 U. S. 97, followed in *Kansas City* v. *Kansas*, 599.

California Powder Works v. *Davis*, 151 U. S. 389, followed in *Chicago & Erie R. R. Co.* v. *Ebersole*, 601.

Carey v. *Houston & T. C. R. Co.*, 150 U. S. 170, followed in *National Telephone Mfg. Co.* v. *American Bell Telephone Co.*, 600.

Chappell Chemical & F. Co. v. *Sulphur Mines Co.*, 172 U. S. 471, followed in *Chicago & Erie R. R. Co.* v. *Ebersole*, 601; *Post Printing & Pub. Co.* v. *Shafroth*, 602; *Zavelo* v. *Leichtman, Goodman & Company*, 605.

Chesapeake & Ohio Ry. Co. v. *McCabe*, 213 U. S. 207, followed in *McCabe* v. *Maysville & B. S. R. R. Co.*, 601; *Clinger* v. *Chesapeake & Ohio Ry. Co.*, 602.

Chicago, B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549, followed in *Schmidinger* v. *Chicago*, 578.

Chicago, B. & Q. R. R. Co. v. *Miller*, 226 U. S. 513, followed in *Chicago, St. P., M. & O. Ry. Co.* v. *Latta*, 519.

Cook v. *Marshall County*, 196 U. S. 261, followed in *Kansas City* v. *Kansas*, 599.
Covington Stock Yards Co. v. *Keith*, 139 U. S. 128, followed in *United States* v. *Union Stock Yards*, 286.
Farrell v. *O'Brien*, 199 U. S. 100, followed in *Glos* v. *Chicago*, 599; *Anderson* v. *Connecticut*, 603; and *Williams* v. *Starkweather*, 604.
Fayerweather v. *Ritch*, 195 U. S. 299, followed in *Williams* v. *Starkweather*, 604.
First National Bank v. *Estherville*, 215 U. S. 341, followed in *Hanson* v. *Gustafson*, 600.
Gonzales v. *Buist*, 224 U. S. 126, followed in *Societe Anonyme* v. *United States*, 600.
Goodrich v. *Ferris*, 214 U. S. 71, followed in *Glos* v. *Chicago*, 599.
Gundling v. *Chicago*, 177 U. S. 183, followed in *Schmidinger* v. *Chicago*, 578.
Haddock v. *Haddock*, 201 U. S. 562, followed in *Thompson* v. *Thompson*, 551.
Hallowell v. *United States*, 221 U. S. 317, followed in *Ship-y-Tuck* v. *United States*, 604.
Hatch v. *Reardon*, 204 U. S. 152, followed in *Darnell* v. *Indiana*, 390.
Heckman v. *United States*, 224 U. S. 413, followed in *Park Rapids Lumber Co.* v. *United States*, 605.
Houghton v. *Payne*, 194 U. S. 88, followed in *Smith* v. *Hitchcock*, 53.
Howard v. *Kentucky*, 200 U. S. 164, followed in *Glos* v. *Chicago*, 599.
Hudson Water Co. v. *McCarter*, 209 U. S. 349, followed in *Eubank* v. *Richmond*, 137.
Humes v. *United States*, 170 U. S. 210, followed in *Societe Anonyme* v. *United States*, 600.
Improvement Co. v. *Munson*, 14 Wall. 442, followed in *Societe Anonyme* v. *United States*, 600.
In re Pennsylvania Company, 137 U. S. 451, followed in *Bright* v. *Chesapeake & Ohio Ry. Co.*, 602.
International Textbook Co. v. *Pigg*, 217 U. S. 91, followed in *Buck Stove & Range Co.* v. *Vickers*, 205.
Kansas City Southern Ry. Co. v. *Albers Commission Co.*, 223 U. S. 573, followed in *Illinois Central R. R. Co.* v. *Henderson Elevator Co.*, 441.
Kidd v. *Alabama*, 188 U. S. 730, followed in *Darnell* v. *Indiana*, 390.
Kimball v. *Kimball*, 174 U. S. 158, followed in *Hanson* v. *Gustafson*, 600.
King v. *West Virginia*, 216 U. S. 92, followed in *Glos* v. *Chicago*, 599.
Lehigh Valley Railroad v. *Pennsylvania*, 145 U. S. 192, followed in *Ewing* v. *Leavenworth*, 464.
Loeber v. *Schroeder*, 149 U. S. 580, followed in *Williams* v. *Starkweather*, 604.
Loewe v. *Lawlor*, 208 U. S. 274, followed in *United States* v. *Reading Co.*, 324.

Low Wah Suey v. *Backus*, 225 U. S. 460, followed in *Chan Kam* v. *Steward*, 602; *Yuk Ping* v. *Steward*, 603.
Michigan C. R. Co. v. *Powers*, 201 U. S. 245, followed in *Kansas City* v. *Kansas*, 599.
Miller v. *Cornwell*, 168 U. S. 131, followed in *Williams* v. *Starkweather*, 604.
Minnesota Iron Co. v. *Kline*, 199 U. S. 593, followed in *Glos* v. *Chicago*, 599.
Missouri Pacific Ry. v. *Fitzgerald*, 160 U. S. 556, followed in *Chicago & Erie R. R. Co.* v. *Ebersole*, 601.
Montague v. *Lowry*, 193 U. S. 38, followed in *Standard Sanitary Mfg. Co.* v. *United States*, 20.
Moran v. *Horsky*, 178 U. S. 205, followed in *Preston* v. *Chicago*, 447.
Patterson v. *Colorado*, 205 U. S. 254, followed in *Kansas City* v. *Kansas*, 599.
Petri v. *Creelman Lumber Co.*, 199 U. S. 487, followed in *Ex parte United States*, 420.
Preston v. *Chicago*, 226 U. S. 447, followed in *Gersch* v. *Chicago*, 451.
Schlemmer v. *Buffalo R. R. Co.*, 205 U. S. 1, followed in *Societe Anonyme* v. *United States*, 600.
Seaboard Airline Ry. Co. v. *Duvall*, 225 U. S. 477, followed in *Medley* v. *West Virginia*, 605.
Slaughter House Cases, 16 Wall. 36, followed in *Rosenthal* v. *New York*, 260.
Spies v. *Illinois*, 123 U. S. 131, followed in *Medley* v. *West Virginia*, 605.
Standard Oil Co. v. *United States*, 221 U. S. 1, followed in *United States* v. *Reading Co.*, 324.
Swift & Co. v. *United States*, 196 U. S. 375, followed in *United States* v. *Reading Co.*, 324.
Taylor v. *Beckham*, 178 U. S. 548, followed in *Preston* v. *Chicago*, 447.
Tracy v. *Ginsberg*, 205 U. S. 170, followed in *Glos* v. *Chicago*, 599.
United States v. *Dalcour*, 203 U. S. 408, followed in *Robertson* v. *Gordon*, 311.
United States v. *Rickert*, 188 U. S. 432, followed in *Park Rapids Lumber Co.* v. *United States*, 605.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 112, followed in *Kansas City* v. *Kansas*, 599.
Water Works Co. v. *Oshkosh*, 187 U. S. 437, followed in *National Surety Co.* v. *Architectural Co.*, 276.
Western Turf Association v. *Greenburg*, 204 U. S. 359, followed in *Selover, Bates & Co.* v. *Walsh*, 112.
Wilkinson v. *Nebraska*, 123 U. S. 286, followed in *Bright* v. *Chesapeake & Ohio Ry. Co.*, 602.
Williams v. *Fears*, 179 U. S. 270, followed in *Kansas City* v. *Kansas*, 599.

Woodwell v. *United States*, 214 U. S. 82, followed in *Evans* v. *United States*, 567.

CHARITABLE TRUSTS.

See WILLS.

CIRCUIT COURT OF APPEALS.

See JURISDICTION, A 4;
PURE FOOD AND DRUGS ACT, 5.

CIRCUIT COURT OF APPEALS ACT.

See APPEAL AND ERROR, 4.

CITIZENSHIP.

See CONSTITUTIONAL LAW, 39, 40.

CLAIMS AGAINST THE UNITED STATES.

1. *Lack of power of public officer to do that on which claim based as fundamental objection.*

Whether claimant's claim rests upon an express or an implied purchase, by an officer of the Government, a lack of power on the part of that officer is a fundamental objection. *Beach* v. *United States*, 243.

2. *Compensation of employés; right to under § 1765, Rev. Stat.*

In this case *held* that the appointment of one holding a government position as special disbursing agent was not an appointment to a separate and distinct office from that already held, but merely an order requiring him to perform additional services, and under § 1765, Rev. Stat., payment therefor in addition to his salary is prohibited. (*Woodwell* v. *United States*, 214 U. S. 82.) *Evans* v. *United States*, 567.

See ARMY AND NAVY.

CLASSIFICATION FOR REGULATION.

See CONSTITUTIONAL LAW, 22, 24–32.

COAL CARRIERS.

See RESTRAINT OF TRADE, 19, 34.

COMBINATIONS IN RESTRAINT OF TRADE.

See INTERSTATE COMMERCE, 9;
RESTRAINT OF TRADE.

COMMERCE.

See CONSTITUTIONAL LAW, 1–7;
INTERSTATE COMMERCE;
RESTRAINT OF TRADE.

COMMON CARRIERS.

See CARRIERS; RAILROADS;
CONSTITUTIONAL LAW, 21; STATES, 3.

COMPETITION.

See RESTRAINT OF TRADE;
STATES, 6.

CONFLICT OF LAWS.

See STATUTES, A 1.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONGRESS, POWERS OF.

Devolution on executive department of proceeding to enforce regulations relative to continued residence of aliens.

Congress may properly devolve a proceeding to enforce regulations under which aliens are permitted to remain within the United States upon an executive department or subordinate officials thereof and may make conclusive the findings of fact reached by such officials after a summary hearing, if fair. *Zakonaite* v. *Wolf*, 272.

See ALIENS, 1; INTERSTATE COMMERCE, 1, 2, 3;
CONSTITUTIONAL LAW, 1; RAILROADS, 4;
RESTRAINT OF TRADE, 13.

CONSPIRACY.

See CRIMINAL LAW, 6, 7;
RESTRAINT OF TRADE.

CONSTITUTIONAL LAW.

1. *Commerce clause; extent of power of Congress under.*

The constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between shipper and carrier of shipments in such commerce in regard to liability for loss or damage to articles carried. *Adams Express* v. *Croninger*, 491.

2. *Commerce clause; extent of protection accorded by.*

The protection accorded by the Federal Constitution to interstate commerce does not extend beyond the sale in original packages as imported; and a contract made in one State for delivery of liquor in another State which does not limit the sale in the latter State to original packages encounters the local statute and cannot be enforced if contrary thereto. *Purity Extract Co.* v. *Lynch*, 192.

3. *Commerce clause; state interference; effect of declaring contract, involving interstate commerce, illegal.*

Where there have been no purchases and no deliveries under a contract for delivery of liquor, but the vendee has given notice of refusal to accept because the contract is illegal in the State of delivery, the state court, in sustaining the illegality of the contract, does not deny the seller the right to sell the article or have it transported in interstate commerce. *Ib.*

4. *Commerce clause; state interference; what deemed original package.*

Where a large number of bottles, each in a separate box, are all contained in one case, each bottle is not to be regarded as a separate original package and protected from interference by state statute under the commerce clause of the Constitution; and this even if the contract of shipment declared there was to be no retail sale by the consignee. *Ib.*

5. *Commerce clause; state taxation of express companies as attempt to tax interstate commerce.*

A license tax on express companies for receiving and sending packages to and from points within the State is not unconstitutional as an attempt to tax interstate commerce when applied to packages passing between such points by routes lying partly through another State. (*Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, followed; *Hanley* v. *Kansas City Southern Railway*, 187 U. S. 617, distinguished.) *Ewing* v. *Leavenworth*, 464.

6. *Commerce clause; validity as to foreign corporations doing interstate business of Kansas statute of 1905 requiring filing of statements.*

The statute of Kansas of 1905, requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce, under the commerce clause of the Federal Constitution. (*International Textbook Company* v. *Pigg*, 217 U. S. 91.) *Bucks Stove Co.* v. *Vickers*, 205.

7. *Commerce clause; validity under, of Indiana statutes taxing shares in foreign corporations.*

The statutes of Indiana taxing all shares in foreign corporations except national banks owned by inhabitants of the State, and all shares in domestic corporations the property whereof is not exempt or taxable to the corporation itself, are not unconstitutional as contrary to the commerce clause of the Federal Constitution. *Darnell* v. *Indiana*, 390.

8. *Contract freedom; State may limit.*

There is no absolute liberty of contract, and limitations thereon by police regulations of the State are frequently necessary in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment. (*C., B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549.) *Schmidinger* v. *Chicago*, 578.
See Infra, 17, 19.

9. *Contract impairment; effect of state statute changing remedy.*

A state statute changing a remedy for enforcing contract rights does not impair the contract if it gives a more efficacious remedy than existed before or does not impair it so materially as to affect the creditor's rights. *Pittsburg Steel Co.* v. *Baltimore Equitable Society*, 455.

10. *Contract obligation; impairment; effect of state statute establishing method for fixing water rates.*

The Supreme Court of Idaho having held that under the constitution of the State the legislature has a continuing and irrevocable power to establish the manner of fixing water rates, and that a municipality can only grant franchises subject to that power, this court follows that construction: and therefore *held* that a statute of the State of Idaho establishing a method for fixing water rates is not unconstitutional under the Federal Constitution as impairing the obligation of the contract with a water company under an ordinance of a municipality previously enacted and which established a different method of fixing such rates. *Murray* v. *Pocatello*, 318.

11. *Contract obligation; impairment of; effect of subsequent law providing more adequate remedy to enforce contract.*

There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. (*Bernheimer* v. *Converse*, 206 U. S. 516.) *National Surety Co.* v. *Architectural Co.*, 276.

12. *Contract obligation; impairment of; law affecting remedy for enforcement of contract not an impairment.*

Where, as the state court has held in this case, the requirement that a preliminary notice that a third party intends to avail of the benefit of a bond given for performance of a contract is a condition precedent to an action on the bond, legislation altering the period within which such notice must be given affects the remedy and not the contract itself and does not amount to an impairment of the obligation of the bond within the contract clause of the Federal Constitution. *Ib.*

13. *Contract obligation; impairment of; validity of c. 413 of Laws of Minnesota of 1909, extending time of notice of suit on bond.*

Chapter 413 of the General Laws of Minnesota of 1909, extending the time within which third parties intending to avail of the benefit of a bond given for completion of public buildings must serve notice of intention so to do, effected merely a change in remedy without substantial modification of the obligation of the contract and is not an unconstitutional impairment thereof. *Ib.*

14. *Due process of law; deprivation of liberty without; right to trial by jury; effect of § 3 of the act of February 20, 1907, relative to deportation of aliens.*

Section 3 of the act of February 20, 1907, 34 Stat. 898, c. 1134, providing for deportation of alien prostitutes within three years after entry into the United States and providing a summary proceeding for determining the fact by the Secretary of Commerce and Labor, does not violate either the Fifth or Sixth Amendment by depriving the alien of her liberty without due process of law or by denying her a jury trial. *Zakonaite* v. *Wolf*, 272.

15. *Due process of law; deprivation of property without; effect of ordinance establishing building lines in city.*

The ordinance of the city of Richmond based on c. 349 of the Laws of Virginia of 1908, requiring the municipal authorities to establish building lines in any block on request of the owners of two-thirds of the property is unconstitutional as an attempt to deprive non-assenting owners of their property without due process of law. *Eubank* v. *Richmond*, 137.

16. *Due process of law; regulation of trades and callings under police power not a denial of.*

The right of the legislature, or the municipality acting under state authority, to regulate trades and callings in the exercise of the

police power without Federal interference under the due process clause of the Fourteenth Amendment, is well settled. (*Gundling* v. *Chicago*, 177 U. S. 183.) *Schmidinger* v. *Chicago*, 578.

17. *Due process of law; equal protection of the laws; liberty of contract; validity of bread loaf ordinance of Chicago of 1908.*

The ordinance of Chicago of 1908 enacted under legislative authority, fixing standard sizes of bread loaves and prohibiting the sale of other sizes, is not unconstitutional as depriving those dealing therein of their property without due process of law or as denying them equal protection of the law or as interfering with their liberty of contract. *Ib.*

18. *Due process and equal protection of the law; police power of State; validity of Minnesota law relative to cancellation of contracts for sale of land.*

A state statute providing that the vendor of lands cannot cancel the contract without reasonable written notice with opportunity to the vendee to comply with the terms is within the police power of the State; and so *held* that c. 223 of the Laws of 1897 of Minnesota is not unconstitutional under the Fourteenth Amendment as depriving a vendor of his property without due process of law or denying him the equal protection of the law. *Selover, Bates & Co.* v. *Walsh*, 112.

19. *Due process of law; equal protection; liberty of contract; validity of South Dakota law of 1907 prohibiting unfair discrimination to destroy competition in sales of commodities.*

Chapter 131 of the Laws of South Dakota of 1907, prohibiting unfair discrimination by anyone engaged in manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in other sections, after equalization for distance, is a constitutional exercise of the police power of the State and is not unconstitutional under the Fourteenth Amendment as depriving persons having more than one place of business in the State of their property without due process of law, or as denying them the equal protection of the laws, or as abridging their liberty of contract. *Central Lumber Co.* v. *South Dakota*, 157.

20. *Due process and equal protection of the law; property rights; validity of law of Hawaii relative to auctioneers' fees.*

Section 1343, Revised Laws of Hawaii, imposing a license fee of six

hundred dollars for auctioneers in the district of Honolulu and fifteen dollars for each other taxation district, is not unconstitutional as depriving an auctioneer in Honolulu of his property without due process of law or as denying him the equal protection of the laws. *Toyota* v. *Hawaii*, 184.

21. *Due process and equal protection of the law; deprivation of property rights; validity of Mississippi statute imposing penalty on carriers for delay in adjusting claims.*

The statute of Mississippi imposing a penalty on common carriers for failure to settle claims for lost or damaged freight in shipment within the State within a reasonable specified period is not unconstitutional under the Fourteenth Amendment, as depriving the carrier of its property without due process of law or as denying it the equal protection of the laws, as to claimants presenting actual claims for amounts actually due. *Yazoo & M. V. R. R. Co.* v. *Jackson Vinegar Co.*, 217.

22. *Due process and equal protection of the law; validity of § 550 of Penal Code of New York relative to purchases by junk dealers.*

Section 550 of the Penal Code of New York as amended in 1903, prohibiting dealers in junk from buying wire, copper, etc., used by, or belonging to a railroad, telephone, or telegraph company without first ascertaining by diligent inquiry that the person selling had a legal right to do so, is not unconstitutional under the Fourteenth Amendment either as depriving junk dealers of their property without due process of law or denying them equal protection of the law by an arbitrary classification of junk dealers or of the property specified. *Rosenthal* v. *New York*, 260.

See Infra, 41, 44.

23. *Equal protection of the law; test of.*

The test of equal protection of the law is whether all parties are treated alike in the same situation. *Selover, Bates & Co.* v. *Walsh*, 112.

24. *Equal protection of the law; police power of State to classify property.*

A State may, in the exercise of its police power, classify separately particular kinds of personal property which the legislature considers more susceptible of theft than other property. *Rosenthal* v. *New York*, 260.

25. *Equal protection of the law; classification of occupations; reasonableness of.*

It is not unreasonable or arbitrary to require dealers in junk to make

diligent inquiry to ascertain that persons selling to them wire cable, iron, etc., belonging to railroads or telegraph companies have a legal right to do so. *Ib.*

26. *Equal protection of the law; classification of occupations; power of State as to.*

Dealers who provide an important and separate market for a particular class of stolen goods may be put in a class by themselves, and so as to dealers in junk. *Ib.*

27. *Equal protection of the law; classification of trades for purposes of regulation not a denial.*

The right of the legislature, or the municipality under legislative authority, to regulate one trade and not another is well settled as not denying equal protection of the laws. *Schmidinger* v. *Chicago*, 578.

28. *Equal protection of the law; presumption in determining reasonableness of classification.*

This court will assume that the legislature of a State or Territory takes into consideration the varying conditions in respective localities in which the same business is to be conducted, and unless palpably arbitrary the classification will not be disturbed. *Toyota* v. *Hawaii*, 184.

29. *Equal protection of the law; reasonableness of classification in the matter of license fees for auctioneers.*

In view of the fact that the great bulk of the business of Hawaii is done at Honolulu this court will not declare that a license fee of six hundred dollars for auctioneers in that district is an arbitrary and unreasonable classification as against fifteen dollars for auctioneer's license in other districts of Hawaii. *Ib.*

30. *Equal protection of the law; power of legislature to vary license fees according to district.*

It is the province of the legislature to determine upon the amount of license fees, and unless the classification is arbitrary and unreasonable it may establish different amounts for different districts. *Ib.*

31. *Equal protection of the law; reasonableness of classification for regulation.*

A classification that logically affects only those who deal in more than one place in the State is not necessarily so unreasonable as to amount to denial of equal protection of the laws. *Central Lumber Co.* v. *South Dakota*, 157.

32. *Equal protection of the law; reasonableness of classification for regulation.*

The enactment of police statutes regulating discrimination in prices for the purpose of destroying competition in several States demonstrates that there is a widespread conviction in favor of such regulation. *Ib.*

33. *Equal protection of the law; validity of state legislation special in character.*

The Fourteenth Amendment does not prohibit state legislation special in character. The legislature may deal with a class which it deems a conspicuous example of what it seeks to prevent, although logically that class may not be distinguishable from others not embraced by the law. *Ib.*

34. *Equal protection of the law; state taxation of foreign corporations; effect to deny; quære as to.*

Quære whether statutes taxing all shares in foreign corporations except national banks owned by inhabitants of the State, and all shares in domestic corporations the property whereof is not exempt or taxable to the corporation itself, deny equal protection of the law by discriminating against stock in corporations of other States, especially as to those having property taxed within the State. *Darnell* v. *Indiana*, 390.

See Supra, 17–34.

35. *Ex post facto laws; when law not retrospective.*

A statute which introduces no new rule is not retrospective. *Obeda* v. *Zialcita*, 452.

36. *Full faith and credit; what judgments entitled.*

The full faith and credit clause of the Federal Constitution, and the statutes enacted thereunder do not apply to judgments rendered by a court having no jurisdiction. *Thompson* v. *Thompson*, 551.

37. *Full faith and credit; judgment entered in conformity with local practice entitled.*

Where the law of the State of matrimonial domicile permits the affidavit on which an order of service by publication is granted to be made on information and belief, the court acquires jurisdiction and the judgment based thereon is entitled to full faith and credit in the courts of other States. *Ib.*

38. *Full faith and credit; effect of decree of divorce without alimony on right to sue for maintenance in another jurisdiction.*

Where the courts of a State have held that a wife may by her conduct forfeit the right to the support of her husband, and cannot have alimony on a divorce decreed in his favor, the courts of other States must give the decree full faith and credit as foreclosing the right of the wife to have alimony and a bar to a suit for maintenance in the courts of other States. *Ib.*

39. *Privileges and immunities; abridgment of; application of prohibition.*

The prohibition of the Fourteenth Amendment against abridgment of privileges or immunities of a citizen of the United States relates only to such privileges and immunities as pertain to citizenship of the United States as distinguished from state citizenship. (*Slaughter House Cases*, 16 Wall. 36.) *Rosenthal* v. *New York*, 260.

40. *Privileges and immunities; right of corporation to claim protection against impairment.*

A corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the laws of a State. (*Western Turf Association* v. *Greenburg*, 204 U. S. 359.) *Selover, Bates & Co.* v. *Walsh*, 112.

41. *Searches and seizures; self-incrimination; effect of subpœna duces tecum on officer of corporation.*

An officer of a corporation is not subjected to an unreasonable search or seizure by a subpœna to produce without *ad testificandum* clause the books and papers of that corporation, nor is he subjected to self-incrimination by such subpœna and an order to produce thereunder or deprived of his liberty without due process of law by being committed for contempt for failure to comply with such order. (*Wilson* v. *United States*, 221 U. S. 361.) *Wheeler* v. *United States*, 478.

Self-incrimination. See Supra, 41.

42. *States; police power; subserviency to Constitution.*

While the police power of the State extends not only to regulations promoting public health, morals and safety but also to those promoting public convenience and general prosperity, it has its limits and must stop when it encounters the prohibitions of the Federal Constitution. *Eubank* v. *Richmond*, 137.

43. *States; police power; validity of exercise; establishment of building lines.*
A municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public streets and across private property on the request of less than all of the owners of the property affected is not a valid exercise of police power, nor does it serve the public safety, convenience or welfare. *Ib.*

44. *States; police power; effect of exercise to deny due process of law.*
Such an ordinance takes private property, not for public welfare but for convenience of other owners of property, and deprives the person whose property is taken of his property without due process of law and is unconstitutional under the Fourteenth Amendment. *Ib.*

45. *States; taxation of Federal agencies.*
An ordinance which taxes without exemption the privilege of carrying on business, part of which is a governmental agency such as telegraphy, and makes no exemption of that class of the business, includes its transaction and is void as an unconstitutional attempt to tax a Federal agency. *Williams* v. *Talladega*, 404.

46. *States; taxation of Federal agencies.*
Where, as in this case, the part of the license exacted necessarily affects the whole it makes the entire tax unconstitutional and void. *Ib.*

CONSTRUCTION OF STATUTES.

See STATUTES, A.

CONTRACTS.

1. *Law governing.*
The obligation of a contract is the law under which it was made, even though it may affect lands in another State; and in an action which does not affect the land itself but which is strictly personal, the law of the State where the contract is made gives the right and measure of recovery. *Selover, Bates & Co.* v. *Walsh*, 112.

2. *Law governing.*
A contract made in one State for the sale of land in another can be enforced in the former according to the *lex loci contractu* and not according to the *lex rei sitæ*. *Polson* v. *Stewart*, 167 Massachusetts, 211, approved. *Ib.*

3. *Proposal to sell to officer of United States; effect as contract.*
A proposal to sell to an officer of the United States that purports to be

an assignment *in præsenti* but which is not in form or substance an assignment and which expressly states that it shall not be binding on the proposer unless accepted by that officer before a specified date, does not become a contract express or implied because of the non-action by that officer on the proposal. *Beach* v. *United States*, 243.

4. *Acceptance by United States; effect of retention of proposal as.*

The retention by the officer of the United States without rejection of a proposal, which contains four different propositions of sale of the same article, only one of which could be accepted, cannot be treated as an acceptance of any one of the propositions. *Ib.*

5. *Implied; want of authority of officer of Government to bind United States.*

He who is without authority to bind his principal by express contract cannot be held to have done so by implication; and the want of authority on the part of the officer of the United States to whom delivery is claimed is fatal to the establishment of an implied contract. *Ib.*

6. *Government; insufficiency of showing to establish.*

In this case one claiming to have sold patents for pneumatic mail tubes to the Postmaster General having failed to show any use of his devices or inventions by the Government, or that any devices or inventions used were those covered by his patents, the Court of Claims rightly dismissed his petition. *Ib.*

7. *Government; conclusiveness of construction and decision of Secretary of Department making contract.*

Where a contract for Government work provides that in case of discrepancies between the specifications and the contract, the matter shall be referred to the Secretary of the Department making the contract, and the contractor agrees to abide by his decision in the premises, the construction given by the Secretary and his decision is final and conclusive. *Plumley* v. *United States*, 545.

8. *Government; right of contractor to recover for extras not ordered in manner prescribed.*

Where a contract for Government work provides that in every instance changes must be made by a prescribed method and approved by the Secretary, the contractor cannot recover for extras not ordered in the manner prescribed; and this rule holds even in a hard case where, as in this instance, the work was extra and of value. *Ib.*

9. *Government; right of contractor to recover for delay.*

Where the contractor fails to notify the Secretary of the cause of delay on the part of the Government in the manner prescribed by the contract and thus enable the Secretary to remove the cause of delay, the contractor cannot recover for the delay caused. *Ib.*

10. *Liability of one agreeing with municipality to perform a public service, for torts and on contract.*

One agreeing to perform a public service for a municipality is responsible for torts to third persons, but for omissions and breaches of contract he is responsible to the municipality alone. *German Alliance Ins. Co.* v. *Home Water Co.*, 220.

11. *With municipal corporation for public service; limitation on liability of contractor.*

A contract between a public service corporation and the municipality should not be unduly extended so as to introduce new parties and new rights and subject those contracting to suits by a multitude of persons for damages for causes which could not in the nature of things have been in contemplation of the parties. *Ib.*

12. *With municipal corporation for public service; right of taxpayer to maintain suit for breach.*

The conclusion that a property owner has no claim against a water supply company for failure to conform to the contract does not deprive him of any right, for had the municipality been guilty of the same acts no suit could be maintained. *Ib.*

13. *Fee contracts between attorneys; how construed.*

A contract between attorneys for division of fees construed according to the definite meaning therein expressed. *Robertson* v. *Gordon*, 311.

14. *Fee contracts between attorneys; consideration; when established.*

Under a contract by attorneys for division of fees, if the attorney claiming did any work, whether more or less, there is no failure of consideration. *Ib.*

15. *Fee contract between attorneys; effect on, of decision of Court of Claims beyond its power to render.*

In this case a contract between two attorneys agreeing to share equally all fees received from an Indian litigation, held not to have been superseded by a decision that one was entitled to a much larger share than the other made by the Court of Claims under authority

of an act of Congress authorizing it to determine the total amount due to all attorneys. *Ib.*

16. *Evidence as to condition precedent; quære as to admissibility.*
Quære whether evidence to prove that there was a condition precedent to be performed before a contract took effect is admissible without a cross-bill. *Ib.*

17. *Obligation of; law in force as; right of parties to particular remedies.*
While, in a general sense, the laws in force at the time the contract is made enter into its obligation, the parties have no vested rights in the particular remedies or modes of procedure then existing. (*Water Works Co.* v. *Oshkosh*, 187 U. S. 437.) *National Surety Co.* v. *Architectural Co.*, 276.

See ACTIONS, 1–4;
CARRIERS, 2;
CONSTITUTIONAL LAW, 1, 2, 8–13, 17–19;
EVIDENCE, 2;
INTERSTATE COMMERCE, 4, 8, 14, 21;
JURISDICTION, A 9, 10;
MAILS, 1, 2, 3;
RESTRAINT OF TRADE.

CONVEYANCES.

1. *Description of property by metes and bounds; description by name of tract yields to.*
While a tract may be so well known by name that it can be described and conveyed without other designation, ordinarily designation by name will yield to the more definite by metes and bounds; and in this case the latter rule should apply. *Veve* v. *Sanchez*, 234.

2. *Description of property; specific boundaries controlling.*
The construction of the description in a mortgage should not depend on the amount of land owned by the mortgagor but on the specific boundaries. *Ib.*

3. *Calls for quantity yield to lines of adjoining owners.*
The general rule in determining what is included in a conveyance is that general calls for quantity must yield to the more certain and locative lines of the adjoining owners which are, or can be made, certain. Nothing in this case warrants a departure from this long established and necessary rule of title. *Ib.*

4. *Estoppel of grantor to deny right to convey.*
The statement in a conveyance that the grantor is the owner of the property described estops the grantor from denying his right to

convey, and if not the owner at the time his subsequent acquisition inures to the benefit of the vendee. *Ib.*

CORNERS IN COMMODITIES.

See RESTRAINT OF TRADE, 24, 25, 32.

CORPORATIONS.

Books of; ownership on dissolution.

Books of a corporation are not the private books of any of the officers and do not become so by the dissolution of the corporation and the transfer of the books to one of such officers. *Wheeler* v. *United States*, 478.

See CONSTITUTIONAL LAW, 6, 7, 34, 40, 41; RESTRAINT OF TRADE, 11, 13, 18, 37; INTERSTATE COMMERCE, 7; STATES, 8; TELEGRAPH COMPANIES, 1.

COURT OF CLAIMS.

1. *Power under act directing determination of amount of attorneys' fees in Indian litigation.*

An act of Congress directing the Court of Claims to determine the amount due attorneys for fees in an Indian litigation to be apportioned by certain attorneys named amongst all entitled to share as agreed among themselves, concerns only the amount and not the manner of distribution, *United States* v. *Dalcour*, 203 U. S. 408, and so *held* as to the act of June 21, 1906, c. 3504, 34 Stat. 325. *Robertson* v. *Gordon*, 311.

2. *Findings of fact by; sufficiency of.*

Recitals by the Court of Claims of the documents upon which the claimant's case alone can rest with a history of the transaction and an express finding that the evidence does not establish the transfer to the Government of that for which claimant demands compensation, with negative findings of claimant's title, are sufficient findings of the ultimate facts to conform to the rules. *Beach* v. *United States*, 243.

See ARMY AND NAVY, 1; CONTRACTS, 15.

COURTS.

1. *Federal and state; interference by former.*

Where the state court has jurisdiction, the Federal court cannot deny the state court the right to exercise it. *Deming* v. *Carlisle Packing Co.*, 102.

2. *What embraced within § 905, Rev. Stat.*
The words "every court within the United States" as used in § 905, Rev. Stat., carrying into effect the full faith and credit clause of the Constitution, include the courts of the District of Columbia. *Thompson* v. *Thompson*, 551.

3. *District Court under Judicial Code as successor to Circuit Court; duty under Expedition Act of 1903.*
The new District Court created by the Judicial Code of 1911 is the successor of the formerly existing Circuit Court and as such is vested with the duty of hearing and disposing of cases under the Expedition Act of 1903, § 291. *Ex parte United States*, 420.

4. *District Courts under Judicial Code; powers of.*
Section 291 of the Judicial Code of 1911 expressly confers powers of the Circuit Court upon the now existing District Courts. *Ib.*

5. *Organization of, under Expedition Act of 1903, to carry out decree of this court.*
Under the Expedition Act of 1903 a court composed as required by that act may be organized at the request of the United States to consider the plan to carry out the decree of this court holding a combination unlawful under the Sherman Anti-trust Act. *Ib.*

6. *Organization of, under Expedition Act of 1903; prohibition of district judge to proceed without.*
In this case the district judge having refused to organize a court under the Expedition Act to determine the form of decree to be entered under the mandate of this court, this court issues its writ of prohibition directed to the district judge against entering a decree. *Ib.*

7. *Executive orders; interference by court.*
Even though a question of law be raised by an order of the Postmaster-General excluding matter from the mails, the court will not interfere unless clearly of the opinion that the order is wrong. (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106.) *Smith* v. *Hitchcock*, 53.

8. *When findings of executive officer not reviewable by.*
The evidence in this case, upon which the order of deportation of an alien on the ground that she was a prostitute and was found practicing prostitution within three years after her entry into the United States was based, being adequate to support the conclusions of fact of the Secretary of Commerce and Labor, and there

having been a fair hearing, those findings are not subject to review by the courts. *Zakonaite* v. *Wolf*, 272.

9. *Wisdom of exercise of police power no concern of.*
The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, cannot declare that the limit of legislative power has been transcended. *Purity Extract Co.* v. *Lynch*, 192.

10. *Wisdom of exercise of police power no concern of.*
For the courts to attempt to determine whether the exercise of the police power within legislative limits is wise would be contrary to our constitutional system and substitute judicial opinion for the legislative will. The only question in this court is whether the legislature had the power to establish the regulation. *Ib.*

11. *When justified in interfering with exercise of police power.*
Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority. *Schmidinger* v. *Chicago*, 578.

See APPEAL AND ERROR, 1; BANKRUPTCY, 2–6; JURISDICTION; MAILS, 8; PRACTICE AND PROCEDURE; RAILROADS, 3; REMOVAL OF CAUSES; RULES OF COURT; SALES, 1.

CRIMINAL APPEALS ACT.

See JURISDICTION, A 5, 6, 7.

CRIMINAL LAW.

1. *Lawful acts as steps in crime.*
Acts absolutely lawful may be steps in a criminal plot. (*Aikens* v. *Wisconsin*, 195 U. S. 206.) *United States* v. *Reading Co.*, 324.

2. *Indictment; presentment; sufficiency of.*
An indictment duly found by the Federal grand jury, while in session in a room adjoining the court room with a door opening into the court room, and which is presented in the manner prescribed by the law of the State to the presiding judge in open court while the jurors are still in session and able to see the actions of the foreman, is not void because the grand jury did not in a body accompany the foreman into the court room. *Breese* v. *United States*, 1.

3. *Indictment; presentment; objection to sufficiency of.*
An objection that an indictment was not, under such circumstances, duly presented and publicly delivered, should be taken at the first opportunity and is lost by failure to do so; nor is it saved by permission given, when pleading not guilty, to take advantage upon motion in arrest of judgment of all matters that can be availed of on motion to quash or demurrer. *Ib.*

4. *Indictment; objections to; effect of § 1025, Rev. Stat.*
Section 1025, Rev. Stat., indicates a policy that technical objections to an indictment not presented at the first opportunity are waived and should be construed as extending to the objection raised in this case, the same not being based on a constitutional right. *Ib.*

5. *Pleading; effect of order saving rights.*
An order of the court saving rights to one pleading to an indictment does not create new rights. *Ib.*

6. *Conspiracy; indictment; necessity for allegation of specific intent to produce natural results.*
Persons purposely engaging in a conspiracy which necessarily and directly produces the result which a prohibitory statute is designed to prevent are, in legal contemplation, chargeable with intending to produce that result; and so *held* that if the details of the conspiracy are alleged in the indictment an allegation of specific intent to produce the natural results is not essential. *United States* v. *Patten*, 525.

7. *Conspiracy; character and effect determined, how.*
The character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Ib.*

8. *Possession of stolen article; effect as proof of guilt.*
Possession of the article stolen may tend to show guilty participation in the burglary, and so *held* in this case as to possession of an automobile. *McNamara* v. *Henkel*, 520.

See ALIENS, 2;
EXTRADITION;
JURISDICTION, A 5, 6, 7.

DAMAGES.

1. *Measure of, in action for personal injuries.*
In this case the trial court appears to have properly instructed the jury in regard to damages to which the plaintiff was entitled for per-

sonal injury, and did not as to future pain, etc., go beyond conservative rules laid down in such cases. *Southwestern Brewery* v. *Schmidt*, 162.

2. *Measure of, in action for personal injuries.*

The court may, within conservative rules, instruct the jury that they may, in estimating the damages of a plaintiff in a personal injury suit, consider loss of time with reference to ability to earn money, temporary or permanent impairment of capacity to earn money, disfigurement and pain, past or reasonably certain to be suffered in the future. (See *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Lindeman*, 143 Fed. Rep. 946.) *Ib.*

3. *Effect of jury setting aside release on question of what amounts paid thereunder represented.*

Where the charge directs that the jury deduct from damages amounts paid under a release executed by plaintiff, if the jury set the release aside it is immaterial what the amounts so paid represented as the transaction was rescinded by the verdict. *Ib.*

See ACTIONS, 4;
APPEAL AND ERROR, 3.

DEATH OF PARTY.

See APPEAL AND ERROR, 8;
JUDGMENTS AND DECREES, 2.

DEEDS.

See CONVEYANCES.

DEPORTATION OF ALIENS.

See ALIENS;
CONSTITUTIONAL LAW, 14;
COURTS, 8.

DESCRIPTION OF PROPERTY.

See CONVEYANCES, 1, 2, 3.

DISCHARGE IN BANKRUPTCY.

See BANKRUPTCY, 1.

DISTRICT COURTS.

See COURTS, 3, 4.

DISTRICT OF COLUMBIA.

See COURTS, 2.

DIVORCE.

1. *Alimony; maintenance assimilated to.*

Statutory maintenance is assimilated to alimony under § 980 of the Code of the District of Columbia. *Thompson* v. *Thompson*, 551.

2. *Matrimonial domicile of parties.*

The State in which the parties were married, where they resided after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile and has jurisdiction over the absent wife. *Ib.*

3. *Process; service by publication.*

Under the prior decisions of this court, service of the summons in a suit for divorce may be by publication if brought in a court of the State of matrimonial domicile. (*Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562.) *Ib.*

4. *Process; sufficiency to validate decree.*

A decree of divorce is not valid even when granted by a court of the State of matrimonial domicile except on actual notice to the defendant, or, if a non-resident, by publication according to the law of the State. *Ib.*

See CONSTITUTIONAL LAW, 37, 38;
JURISDICTION, A 1, 2.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 14–22, 41, 44.

EJECTMENT.

Proof of title by plaintiff.

In ejectment the plaintiff must recover on the strength of his own title and cannot prove by parol that a part of the land conveyed was not included in the grant; a contrary rule would make every grantee liable to have what had been conveyed to him taken away by word of mouth. *Veve* v. *Sanchez*, 234.

ELKINS ACT.

See INTERSTATE COMMERCE, 6, 10.

EMPLOYER AND EMPLOYÉ.

See MASTER AND SERVANT;
EMPLOYERS' LIABILITY ACT.

EMPLOYERS' LIABILITY ACT.

1. *Actions may be maintained by whom.*

Under the Federal Employers' Liability Act the beneficiaries of one killed cannot maintain an action against the employer except as personal representatives of the deceased; but where the plaintiff is sole beneficiary and takes out letters after the commencement of the action, the court may allow an amendment alleging that the plaintiff sues in the capacity of administrator. *Missouri, K. & T. Ry. Co.* v. *Wulf*, 570.

2. *Effect to supersede state law; presumption as to judicial notice.*

Even if the petition in a suit against an interstate carrier for the death of one engaged in interstate commerce asserts a cause of action under the state statute, without referring to the Federal Employers' Liability Act, the court is presumed to be cognizant of the Federal act and of the fact that it has superseded state laws upon the subject. *Ib.*

3. *Amendment of pleading in suit under; effect as new cause of action barred by statute of limitations.*

An amendment to the effect that plaintiff sues as personal representative on the same cause of action under the Federal statute instead of as sole beneficiary of the deceased under the state statute, is not equivalent to the commencement of a new action and is not subject to the statute of limitations. (*Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, distinguished.) *Ib.*

EQUAL PROTECTION OF THE LAW.

See CONSTITUTIONAL LAW, 17–34.

ESTOPPEL.

See CONVEYANCES, 4;
INTERSTATE COMMERCE, 20;
PUBLIC LANDS, 2.

EVIDENCE.

1. *Probative force of.*

Evidence should, if unexplained, be accorded its natural probative force. *McNamara* v. *Henkel*, 520.

2. *Parol not admissible to vary written contract; rule in Porto Rico.*

The rule prohibiting written contracts from being varied by parol is not confined to the common law, but was in force in Porto Rico in 1885 and since then. *Veve* v. *Sanchez*, 234.

See APPEAL AND ERROR, 8;
CONTRACTS, 16;
CRIMINAL LAW, 8;
EJECTMENT;
EXTRADITION, 2;
JUDGMENTS AND DECREES, 1;
PRACTICE AND PROCEDURE, 2;
RESTRAINT OF TRADE, 41, 42;
STATUTES, A 6.

EXECUTIVE DEPARTMENTS.

See CONGRESS, POWERS OF.

EXECUTIVE ORDERS.

See COURTS, 7.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 35.

EXTRADITION.

1. *Habeas corpus; availability to review decision of committing magistrate.*

Under § 5270, Rev. Stat., if the committing magistrate has jurisdiction and the offense charged is within the treaty and there is legal evidence on which to exercise his judgment as to sufficiency of the facts to establish criminality for purposes of extradition, the decision of the magistrate cannot be reviewed on *habeas corpus*. *McNamara* v. *Henkel*, 520.

2. *Evidence; sufficiency for purposes of.*

In this case there was competent evidence that the crime of burglary as defined by the law of the State where accused was arrested had been committed and extradition was properly granted under the treaties with Great Britain of 1842 and 1889. *McNamara* v. *Henkel*, 520.

See HABEAS CORPUS.

FACTS.

See COURT OF CLAIMS, 2;
PRACTICE AND PROCEDURE, 6–10.

FEDERAL AGENCIES.

See CONSTITUTIONAL LAW, 45, 46;
STATES, 9.

FEDERAL QUESTION.

1. *Local and not Federal question.*

What amounts to selling at auction, within the meaning of a license statute, is for the state or territorial court to determine, and presents no Federal question reviewable by this court. *Toyota* v. *Hawaii*, 184.

2. *Status of state officer a local question.*

Whether a state officer is within the classified service and not subject to removal under the Civil Service Act of the State is a matter for the state court to determine, and its ruling is binding upon this court and presents no Federal question. (*Taylor* v. *Beckham*, 178 U. S. 548.) *Preston* v. *Chicago*, 447.

3. *Construction of state statute; question of applicability before this court.*

With the ruling of the state court as to the applicability of a state statute to a particular contract this court has nothing to do. It is concerned only with the question of whether as so applied the law violates the Federal Constitution. *Selover, Bates & Co.* v. *Walsh*, 112.

4. *When questions of the lex loci contractus and lex loci solutionis local and not Federal.*

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in litigation and do not, unless specially so claimed, constitute the setting up of a Federal right or privilege. *El Paso & S. W. R. R. Co.* v. *Eichel*, 590.

See APPEAL AND ERROR, 2;
JURISDICTION, A.

FIFTH AMENDMENT.

See ALIENS, 2;
CONSTITUTIONAL LAW, 14.

FINDINGS OF FACT.

See COURT OF CLAIMS, 2;
PRACTICE AND PROCEDURE, 6–10.

FOREIGN CORPORATIONS.

See CONSTITUTIONAL LAW, 6, 7, 34;
STATES, 8.

FOURTEENTH AMENDMENT.

See CONSTITUTIONAL LAW, 8, 18, 19, 21, 22, 33, 39, 40, 44.

FRAUD.

See TRADE-MARKS, 2, 3, 4, 5.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 36–38;
COURTS, 2;
JURISDICTION, A 9, 10.

GOVERNMENTAL AGENCIES.

See CONSTITUTIONAL LAW, 45, 46;
STATES, 9.

GOVERNMENTAL POWERS.

Governmental powers must be flexible and adaptive. *Eubank* v. *Richmond*, 137.

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 30;
COURTS, 10, 11.

GRAND JURY.

See CRIMINAL LAW, 2.

HABEAS CORPUS.

Scope of review on.

Habeas corpus does not operate as a writ of error and mere errors are not subject to review, and so *held* as to an objection that depositions used in an extradition case were not properly certified. *McNamara* v. *Henkel*, 520.

See EXTRADITION, 1.

HEPBURN ACT.

See INTERSTATE COMMERCE, 10, 16, 17.

HOMESTEADS.

See PUBLIC LANDS, 1, 2.

HUSBAND AND WIFE.

See CONSTITUTIONAL LAW, 38;
DIVORCE.

IMMIGRATION.
See ALIENS.

IMMUNITY OF WITNESSES.
See WITNESSES.

IMPAIRMENT OF CONTRACT OBLIGATION.
See CONSTITUTIONAL LAW, 9–13.

INDICTMENT AND INFORMATION.
See CRIMINAL LAW, 2, 3, 4, 6;
JURISDICTION, A 7.

INFRINGEMENT.
See TRADE-MARKS.

INJUNCTION.
See RAILROADS, 3;
RESTRAINT OF TRADE, 7;
TRADE-MARKS, 1.

INSTRUCTIONS TO JURY.
See DAMAGES, 1, 2.

INTERSTATE COMMERCE.

1. *Authority over; supremacy of Congress.*
There can be no divided authority over interstate commerce, and regulations of Congress on that subject are supreme. *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 426.

2. *Authority over; when that of State ceases.*
As to those subjects upon which the States may act in the absence of legislation by Congress, the power of the State ceases the moment Congress exerts its paramount authority thereover. *Ib.*

3. *Supremacy of power of Congress; effect of exercise on power of States.*
Since the decisions of this court in *Chicago, Milwaukee & St. Paul Railway* v. *Solan*, 169 U. S. 133, and *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, Congress has by § 20 of the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Carmack amendment, legislated directly upon the carrier's liability for loss of and damage to interstate shipments, and this legislation supersedes all regulations and policies of a particular State upon the

same subject. *Adams Express Co.* v. *Croninger*, 491; *Chicago, B. & Q. Ry. Co.* v. *Miller*, 513; *Chicago, St. P., M. & O. Ry. Co.* v. *Latta*, 519.

4. *State's power over, dependent upon silence of Congress.*
Only the silence of Congress authorizes the exercise of the police power of the State upon the subject of contracts with carriers for interstate shipments, and when Congress exercises its authority the regulating power of the State is at an end. *Adams Express Co.* v. *Croninger*, 491.

5. *Power of State to regulate liability of interstate carriers.*
Until Congress has legislated upon that subject, the liability of a carrier, although engaged in interstate commerce, for loss or damage to property carried, may be regulated by law of the State. *Ib.*

6. *Equality of shippers; object of act to regulate.*
It is the object of the Interstate Commerce Act and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit all practices running counter to the purpose of placing all shippers upon equal terms. *United States* v. *Union Stock Yard Co.*, 286.

7. *What constitutes; effect of manufactory and warehouses in different States.*
A corporation having a manufactory in one State and warehouses in several other States held to be engaged in interstate commerce under the circumstances of this case. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

8. *Bills of lading; uniformity of; intention of Congress in Carmack amendment.*
In enacting the Carmack amendment it is evident that Congress intended to adopt a uniform rule as to the liability imposed upon interstate carriers by state regulations of bills of lading and to relieve such contracts from the diverse regulation to which they had theretofore been subject. *Adams Express Co.* v. *Croninger*, 491.

9. *Combinations within purview of act to regulate.*
In view of continuity of operation, manner of compensation for, and performance of, services in connection with interstate transportation, the Union Stock Yard & Transit Company and the Chicago Junction Railway Company are subject to the terms of the Act to Regulate Commerce and must conform to its requirements in regard to filing tariff and desist from also unlawful discriminations to shippers. *United States* v. *Union Stock Yard Co.*, 286.

10. *Instrumentalities within purview of act to regulate.*
The Interstate Commerce Act, as amended by the Elkins and Hepburn Acts, extends to all terminal facilities and instrumentalities. *Ib.*

11. *Service within State covered by act to regulate.*
Service that is performed wholly in one State is still subject to the Act to Regulate Commerce if it is a part of interstate commerce. *Ib.*

12. *Character of commerce as; how determined.*
The character of the service rendered in regard to carriage of interstate freight and not the manner in which the goods are billed determines whether the commerce is interstate or not; and so *held* that although neither the Stock Yard Company nor the Junction Railway Company issues through bills of lading, still, as the goods handled are in transit from one State to another, both corporations are engaged in interstate commerce. *Ib.*

13. *Railroads within meaning of act to regulate.*
Where two corporations, the controlling stock of both of which is owned by one holding company, operate jointly, one handling only the stock yard business and the other the business of transferring and switching cars containing freight in interstate transit, both are to be deemed railroads within the terms of the Act to Regulate Commerce and are subject to its requirements. *Ib.*

14. *Discrimination within prohibition of act to regulate.*
A contract by an interstate carrier by railroad to pay a part of the cost of the plant of one of its shippers who agrees only to handle goods moved by it, *held* in this case to be an illegal discrimination and rebate under the Act to Regulate Commerce. *Ib.*

15. *Discrimination within prohibition of act to regulate.*
A shipper receiving a bonus from the carrier for erecting a plant on the line of the carrier has an undue advantage over a shipper not receiving any bonus or a smaller bonus. *Ib.*

16. *Deliveries of cars; duty of carrier under Hepburn Act.*
By the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, Congress legislated concerning the deliveries of cars in interstate commerce, and made it the duty of the carrier to provide and furnish transportation. *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 426.

17. *Deliveries of cars; power of State to regulate; effect of Hepburn Act.*
Since the enactment of the Hepburn Act it is beyond the power of a State to regulate the delivery of cars for interstate shipments, and so *held* as to the Reciprocal Demurrage Law of Minnesota of 1907. *Ib.*

18. *Lease of railroad by owning company; effect on operation of law.*
While the Act to Regulate Commerce excludes transportation wholly within a State, a corporation owning a railroad and doing other business in connection with freight in interstate carriage cannot, by leasing the railroad to another company for a share of the profits, exempt itself from the operation of the law. *United States* v. *Union Stock Yard Co.*, 286.

19. *Charges based on value of articles transported not violative of Carmack amendment.*
The provisions of the Carmack amendment are not violated by a plain provision in a bill of lading basing the charges on value of article transported and charging higher rates for increasing liability as value is declared; and so *held* as to express rates filed with the Interstate Commerce Commission. *Adams Express Co.* v. *Croninger*, 491.

20. *Posting of rates; effect of failure of carrier on right to collect published tariff rate.*
Failure to post rates does not estop the carrier from collecting the published tariff rate notwithstanding a lower rate may have been quoted to the shipper. (*Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573.) *Illinois Cent. R. R. Co.* v. *Henderson Elevator Co.*, 441.

21. *Limitation of liability; interstate carrier may contract for.*
An interstate carrier may, by a fair, open and reasonable agreement, limit the amount recoverable by the shipper to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of risk. *Adams Express Co.* v. *Croninger*, 491.

22. *Limitation of liability by interstate carrier within public policy.*
A limitation of liability based upon an agreed value to obtain a lower rate does not conflict with any sound principle of public policy; and it is not conformable to plain principles of justice that a shipper may understate value in order to reduce the rate and then recover a larger value in case of loss. *Ib.*

23. *Remedies; application of proviso in Carmack amendment.*
A *proviso* reserving certain rights of action will not be construed as nullifying the statute itself and maintaining the existing confusion which it was the purpose of Congress to put an end to; and so *held* that the *proviso* in the Carmack amendment related to remedies under existing Federal law at the time of this action and not to any state law. *Ib.*

See CONSTITUTIONAL LAW, 1–7.
RESTRAINT OF TRADE.

INTERSTATE COMMERCE COMMISSION.

1. *Orders of; incidental character.*
An order to maintain through rates incident to a requirement to make switch connections is incidental thereto and falls with it. *United States* v. *Baltimore & Ohio S. W. R. R. Co.*, 14.

2. *Power to require switch connections.*
Under § 7 of the act of June 18, 1910, 36 Stat. 539, 547, c. 309, the Interstate Commerce Commission cannot require a main trunk road to make switch connections with a road which is not actually at the time a lateral branch road. *Ib.*

3. *Lateral branch railroads within meaning of § 7 of act of June 18, 1910.*
In this case *held*, that a railroad parallel with a main trunk line and operated by a traction company as an independent venture and not as a mere feeder was not a lateral branch railroad within the meaning of § 7 of the act of June 18, 1910. *Ib.*

INTERVENTION.

See APPEAL AND ERROR, 7.

INTOXICATING LIQUORS.

1. *Police power of State to prohibit sales of innocuous beverages in connection with power to prohibit sales of intoxicants.*
A State may, in the exercise of its police power, prohibit the sale of intoxicating liquor, and to the end of making the prohibition effectual may include in the prohibition beverages which separately considered may be innocuous; and so held as to Poinsetta, a beverage containing a small percentage of malt. *Purity Extract Co.* v. *Lynch*, 192.

2. *Power of State to prohibit sales includes what.*
In the exercise of its police power to prohibit the sale of intoxicants a

State may include within the prohibition malt and other liquors sold under the guise of innocent beverages. *Ib.*

3. *Prohibition of sale of non-intoxicants as necessary to prevent sale of intoxicants.*

The legislation to that effect in many of the States shows that the opinion is extensively held that a general prohibition of sale of malt liquors whether intoxicating or not is necessary to suppress the sale of intoxicants. *Ib.*

4. *What within Wilson Act; quære as to.*

Quære, and not decided, whether an article such as Poinsetta, the beverage involved in this case, having a low percentage of malt, is governed by the Wilson Act. *Ib.*

See CONSTITUTIONAL LAW, 2, 3.

JUDGMENTS AND DECREES.

1. *Collateral impeachment of.*

The judgment of a court that a right is established cannot be impeached collaterally by proof that the judgment was wrong. *Burnet* v. *Desmornes*, 145.

2. *Joint; effect of death of party.*

A joint judgment ceases to be joint by the death of one of the parties. *Kalanianaole* v. *Smithies*, 462.

3. *Voidable but not void, when.*

Although an affidavit used as a basis for an order of publication of the summons may be defective in the mode of stating material facts, if the facts are stated, the judgment, though voidable on direct attack, is not void on its face and *coram non judice*. *Thompson* v. *Thompson*, 551.

See CONSTITUTIONAL LAW, 36, 37, 38; COURTS, 5, 6; JURISDICTION, A 4, 12, 13; RES JUDICATA.

JUDICIAL CODE.

See COURTS, 3, 4; STATUTES, A 5.

JUDICIAL DISCRETION.

See PRACTICE AND PROCEDURE, 1, 2; RESTRAINT OF TRADE, 16.

JUNK DEALERS.

See CONSTITUTIONAL LAW, 22, 25, 26.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy; sufficiency of estimated expectancy of payments for maintenance.*

Notwithstanding the obligation to make continuing payments for maintenance of a wife and children is not, even when fixed by judicial decree, in the nature of a technical debt, it may, when so fixed, be estimated on expectancy of life, and the total amount may sustain a jurisdiction based on amount involved. *Thompson* v. *Thompson*, 551.

2. *Amount in controversy; sufficiency of estimated payments for maintenance.*

In this case, as the amount due under a judgment of the Supreme Court of the District of Columbia for support and maintenance at the rate of $75.00 a month together with amount to accrue due during expectancy of life of the wife amounts to over $5,000, this court has jurisdiction under the act of February 9, 1893. *Ib.*

3. *Amount in controversy; quære as to.*

Quære whether in this case the jurisdictional amount of $25,000 was involved. *Harty* v. *Victoria*, 12.

4. *To review judgment of Circuit Court of Appeals; what amounts to final judgment under § 6 of Judiciary Act of 1891.*

Where the jurisdiction of the Circuit Court does not depend entirely on diverse citizenship but is also founded upon a Federal statute and the amount exceeds one thousand dollars, the judgment of the Circuit Court of Appeals is not final under § 6 of the Judiciary Act of 1891. *Missouri, K. & T. Ry. Co.* v. *Wulf*, 570.

5. *Under Criminal Appeals Act of 1907.*

On appeal under the Criminal Appeals Act of March 2, 1907, this court must accept the lower court's construction of the counts, and its jurisdiction is limited to considering whether the decision of the court below that the acts charged are not criminal is based upon an erroneous construction of the statute alleged to have been violated. *United States* v. *Patten*, 525.

6. *Under Criminal Appeals Act; when construction of statute involved.*

In order to decide whether acts charged are within the condemnation

of a statute, the court must first ascertain what the statute does condemn and that involves its construction. *Ib.*

7. *Under Criminal Appeals Act; determination of illegality of acts under statute charged to have been violated.*

On appeal under the Criminal Appeals Act of 1907 this court must assume that the counts of the indictment adequately allege whatever the lower court treated them as alleging; and, where its decision shows that it assumed that every element necessary to form a combination was present, this court has jurisdiction to determine whether such a combination was illegal under the statute which defendants are charged with violating. *Ib.*

8. *Under § 709, Rev. Stat.; when claim of Federal right sufficiently raised.*

This court cannot review a judgment of the state court under § 709, Rev. Stat., on the ground of denial of a Federal right, privilege or immunity unless the same was specially set up or claimed in the state court. *El Paso & S. W. R. R. Co.* v. *Eichel*, 590.

9. *Under § 709, Rev. Stat.; when claim of Federal right sufficiently asserted.*

In this case the insistence of plaintiff in error that his rights under a contract were to be determined according to the law of a different State, did not amount to claiming that full faith and credit was denied to the law of another State so as to give a basis for a review of the judgment by this court under § 709, Rev. Stat. *Ib.*

10. *Under § 709, Rev. Stat.; absence of basis for claim of denial of full faith and credit.*

Where, as in this case, it appears that the state court based its decision upon the interpretation of the contract and not upon the law of another State, there is no basis for review by this court on the ground of failure to give full faith and credit to the acts of another State. *Ib.*

11. *Under § 709, Rev. Stat.; sufficiency of assertion of Federal right.*

The assertion of a Federal right in an unsuccessful application to the highest court of a State to grant a writ of error to a lower court of that State raises no question reviewable in this court. *Ib.*

12. *To review judgment of state court; finality of judgment essential.*

This court cannot be called upon to review the action of the state court by piecemeal, and even if the judgment does finally dispose of some elements of the controversy, unless it is final on its face as to the entire controversy this court will not review it. *Louisiana Nav. Co.* v. *Oyster Commission*, 99.

13. *To review judgment of state court; finality of judgment; form controlling in determination of.*

On the question of finality the form of the judgment is controlling, and that form cannot be disregarded in order to ascertain whether the judgment is a final one according to state law. *Ib.*

14. *To review judgment of state court; when want of finality presumed.*

The dismissal of the writ of error for want of finality of the judgment in this case is on the presumption that the case otherwise involves Federal questions reviewable by this court. *Ib.*

15. *To review judgment of state court; Federal controversies to be decided; effect of scope of decision by state court.*

This court has the power and duty when reviewing the final judgment of a state court to pass on all Federal controversies in the cause irrespective of how far such questions were concluded by the state law during the litigation and before a final judgment reviewable here was rendered. *Ib.*

16. *To review judgment of state court, wanting, when Federal question presented is plainly frivolous.*

Even though the record may present in form a Federal question the writ of error will be dismissed if it plainly appear that the Federal question is so unsubstantial and devoid of merit as to be frivolous. *Deming* v. *Carlisle Packing Co.*, 102.

17. *To review judgment of state court; when Federal question frivolous.*

In this case the only Federal question which was based on the refusal of the state court to remove the cause as to the non-resident defendants on the ground of fraudulent joinder of the resident defendant and is frivolous as shown by the fact that the trial court refused to nonsuit as to the resident defendant and there was a verdict against all. *Ib.*

18. *To review judgment of state court; when judgment rests on sufficient non-Federal ground.*

Where the judgment of the state court rests upon non-Federal questions sufficient to support it, such as laches and long delay, this court cannot review the judgment upon the ground that a Federal question also exists. (*Moran* v. *Horsky*, 178 U. S. 205.) *Preston* v. *Chicago*, 447.

See APPEAL AND ERROR;
FEDERAL QUESTION.

B. Of Circuit Courts of Appeals.

See Pure Food and Drugs Act, 5;
Supra, A 4.

C. Of District Courts.

See Bankruptcy, 2;
Courts, 3, 4;
Restraint of Trade, 10.

D. Of Court of Claims.

See Army and Navy, 1.

E. Of Interstate Commerce Commission.

See Interstate Commerce Commission.

F. Of Federal and State Courts.

See Courts, 1.

G. Of State Courts.

Over property in other States.

The court may, through action upon, or constraint of, the person within its jurisdiction, affect property in other States. *Selover, Bates & Co.* v. *Walsh*, 112.

H. Generally.

1. *Effect of simultaneous filing of formal appearance and exception to jurisdiction.*

Where defendant files a formal appearance and simultaneously files an exception to the jurisdiction, the two papers should be considered together, and as such cannot be regarded as a consent to submit to the jurisdiction in a case where consent is necessary. *Wood* v. *Wilbert*, 384.

2. *Effect of expiration, before action brought, of statutory period of limitation.*

The provisions of Art. 137 of the Civil Code of Porto Rico of 1889 and of § 199 of the act of March 1, 1902, of Porto Rico, requiring actions to claim filiation to be commenced within prescribed periods, do not deprive the court of jurisdiction in case the action is not brought until after the prescribed period. It is a defense that must be pleaded. *Burnet* v. *Desmornes*, 145.

3. *Effect of prescription on.*
Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. *Burnet* v. *Desmornes*, 145.

4. *To determine reasonableness of municipal license ordinance.*
Unless there is a claim that a Federal right is violated the reasonableness of a municipal license ordinance is for the State to determine. *Williams* v. *Talladega*, 404.

See CONSTITUTIONAL LAW, 37; DIVORCE, 2; RES JUDICATA, 1, 2, 3; SALES, 1.

JURY TRIAL.

See CONSTITUTIONAL LAW, 14.

LACHES.

See JURISDICTION, A 18.

LAND GRANTS.

See PUBLIC LANDS; RIPARIAN RIGHTS.

LAW GOVERNING.

See CONTRACTS, 1, 2; EMPLOYERS' LIABILITY ACT, 2; INTERSTATE COMMERCE, 1–5; TELEGRAPH COMPANIES, 1.

LEASE.

See INTERSTATE COMMERCE, 18.

LEGISLATIVE POWERS.

See CONGRESS, POWERS OF; CONSTITUTIONAL LAW, 30; COURTS, 9, 11.

LEX LOCI CONTRACTUS.

See FEDERAL QUESTION, 4.

LEX LOCI SALUTIONIS.

See FEDERAL QUESTION, 4.

LIBERTY OF CONTRACT.

See CONSTITUTIONAL LAW, 8, 17, 19.

LICENSE TAXES.

See CONSTITUTIONAL LAW, 5, 29, 30, 45, 46;
TELEGRAPH COMPANIES, 2.

LIMITATION OF ACTIONS.

See EMPLOYERS' LIABILITY ACT, 3;
JURISDICTION, H 2.

LIMITATION OF LIABILITY.

See INTERSTATE COMMERCE, 21, 22.

LIQUORS.

See CONSTITUTIONAL LAW, 2, 3:
INTOXICATING LIQUORS.

LIVE STOCK.

See CARRIERS, 1.

LOCAL LAW.

District of Columbia. Section 980 of Code, relative to maintenance of wife and children (see Divorce, 1). *Thompson* v. *Thompson*, 551.

Hawaii. Rev. Laws, § 1343, prescribing license fees for auctioneers (see Constitutional Law, 20). *Toyota* v. *Hawaii*, 184.

Idaho. Statute establishing a method for fixing water rates (see Constitutional Law, 10). *Murray* v. *Pocatello*, 318.

Illinois. Ordinance of Chicago of 1908 regulating sizes of bread loaves (see Constitutional Law, 17). *Schmidinger* v. *Chicago*, 578.

Indiana. Taxation of shares in foreign corporations (see Constitutional Law, 7). *Darnell* v. *Indiana*, 390.

Iowa. Riparian rights (see Riparian Rights, 1). *Marshall Dental Mfg. Co.* v. *Iowa*, 460.

Kansas. Law of 1905, regulating foreign corporations (see Constitutional Law, 6). *Bucks Stove Co.* v. *Vickers*, 205.

Louisiana. Actions (see Bankruptcy, 2). *Wood* v. *Wilbert*, 384.

Maryland. Chapter 305, Laws of 1908 (see Practice and Procedure, 28). *Pittsburg Steel Co.* v. *Baltimore Equitable Society*, 455.

Minnesota. Chapter 223, Laws of 1897, relative to contracts for sale of lands (see Constitutional Law, 18). *Selover, Bates & Co.* v. *Walsh*, 112.

Chapter 413 of General Laws of 1909, relative to bonds of contractors for public works (see Constitutional Law, 13). *National Surety Co.* v. *Architectural Co.*, 276.

Reciprocal Demurrage Law of 1907 (see Interstate Commerce, 17). *Chicago, R. I. & P. Ry. Co.* v. *Hardwick Elevator Co.*, 426.

Mississippi. Statute imposing penalty on common carriers for failure to settle claims within specified period (see Constitutional Law, 21). *Yazoo & M. V. R. R. Co.* v. *Jackson Vinegar Co.*, 217.

New York. Section 550 of Penal Code, regulating dealers in junk (see Constitutional Law, 22). *Rosenthal* v. *New York*, 260.

Philippine Islands. Trade-Mark Act (see Trade-Marks, 2). *Obeda* v. *Zialcita*, 452.

Porto Rico. Article 137 of Civil Code of 1889 and § 199 of the act of March 1, 1902, relative to limitation of actions to claim filiation (see Jurisdiction, H. 2). *Burnet* v. *Desmornes*, 145.

Admissibility of evidence (see Evidence, 2). *Veve* v. *Sanchez*, 234.

South Dakota. Chapter 131 of Laws of 1907, prohibiting unfair discrimination to destroy competition in sales of commodities (see Constitutional Law, 19). *Central Lumber Co.* v. *South Dakota*, 157.

Virginia. Chapter 349 of Laws of 1908, relative to establishment by municipalities of building lines (see Constitutional Law, 15). *Eubank* v. *Richmond*, 137.

MAILS.

1. *Postmaster General; power conferred by act of July 13, 1892, relative to pneumatic tubes.*

The provision in the Post Office Appropriation Act of July 13, 1892, 27 Stat. 145, c. 165, authorizing the Postmaster General to examine into transportation of mail by pneumatic tubes did not authorize the purchase of any apparatus or patents, and all parties including claimant were notified of this by the Postmaster General. *Beach* v. *United States*, 243.

2. *Postmaster General's power respecting pneumatic tubes.*
Under no other statutes enacted prior to the inception of the claimant's demand was the Postmaster General authorized to purchase or contract for apparatus or patents for pneumatic tubes. *Ib.*

3. *Contracts; effect to create, of retention by Postmaster General of proposal relative to postal service.*
The retention without express rejection of a proposal in answer to an advertisement of the Postmaster General which expressly states that the proposals are for investigation and estimate and that the Postmaster General has no authority to contract for expenditure of money does not constitute a contract either express or implied. *Ib.*

4. *Periodical within meaning of act of March 3, 1879.*
Every series of printed papers published at definite intervals is not necessarily a periodical within the meaning of the provisions of the act of March 3, 1879, c. 180, 20 Stat. 355, defining second-class mail matter. *Smith* v. *Hitchcock*, 53.

5. *Periodicals; books published serially as.*
Books that are expressly embraced by § 17 of the act of March 3, 1879, as third-class matter and subject to the higher rate of postage cannot be made second-class matter by simply publishing them at regular intervals even though, as in this case, purporting to be a series of adventures of the same person. (*Houghton* v. *Payne*, 194 U. S. 88.) *Ib.*

6. *Periodicals defined.*
"Periodical" as used in the act of March 3, 1879, implies that no single number of a series is a complete book in itself. *Ib.*

7. *Periodicals and books differentiated.*
As a general rule, with few exceptions, a printed publication is a book within the meaning of § 17 of the act of March 3, 1879, when its contents are complete in themselves, deal with a single subject, need no continuation and have appreciable size; and so *held* that the publications involved in this case are books and not periodicals. *Ib.*

8. *Hearing to which aggrieved party entitled under act of March 3, 1901; right of resort to courts.*
Where the point to be decided is a pure question of law which can be reviewed by the courts, the Postmaster General satisfies the re-

quirements of the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, by simply hearing the party claiming to be aggrieved by an order excluding matter from the mail; and one so heard and who is not prevented from offering material evidence cannot complain in the court reviewing the order that he was denied a hearing under the act. *Ib.*

See CONTRACTS, 6;
COURTS, 7.

MAINTENANCE.

See DIVORCE, 1;
JURISDICTION, A 1, 2.

MANDAMUS.

See APPEAL AND ERROR, 8;
PRACTICE AND PROCEDURE, 23.

MANDATE.

See PRACTICE AND PROCEDURE, 15.

MASTER AND SERVANT.

1. *Servant's knowledge of danger; master's liability notwithstanding.*
A master may remain liable for a certain time for a failure to use reasonable care in furnishing a safe place for the servant to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise to remove the source of danger. *Southwestern Brewery* v. *Schmidt*, 162.

2. *Cause of injury; safety of place and appliances; when master not liable.*
The evidence in this case not showing that the injury suffered by the servant was caused by failure of the master to provide a safe place or proper appliances, the trial court rightly took the case from the jury, and directed a verdict for defendant. *Anderson* v. *Smith*, 439.

See EMPLOYERS' LIABILITY ACT.

MATRIMONIAL DOMICILE.

See DIVORCE, 2.

MEASURE OF DAMAGES.

See DAMAGES, 1, 2.

MERGERS.
See RESTRAINT OF TRADE, 28.

MILITARY AND POST ROADS.
See TELEGRAPH COMPANIES, 2, 3.

MINERAL LANDS.
See PUBLIC LANDS, 1.

MISJOINDER OF PARTIES.
See PARTIES.

MONOPOLIES.
See RESTRAINT OF TRADE;
STATUTES, A 8.

MORTGAGES AND DEEDS OF TRUST.
See CONVEYANCES, 2.

MUNICIPAL CORPORATIONS.
Duty to furnish water for fire protection.
A municipality is not bound to furnish water for fire protection, and if it voluntarily undertakes to do so it does not subject itself to a greater liability. *German Alliance Ins. Co.* v. *Home Water Co.*, 220.
See ACTIONS, 3, 4;
CONSTITUTIONAL LAW, 10, 16, 27, 43, 44;
CONTRACTS, 10, 11, 12;
PRACTICE AND PROCEDURE, 12.

MUNICIPAL ORDINANCES.
See PRACTICE AND PROCEDURE, 11.

NAVY.
See ARMY AND NAVY, 4, 5.

NEGLIGENCE.
See CARRIERS, 2.

NOTICE.
See BANKRUPTCY, 1;
DIVORCE, 4;
PUBLIC LANDS, 3.

OCCUPATIONS.

See CONSTITUTIONAL LAW, 16, 25–29;
STATES, 2, 5.

OPINIONS OF THE COURT.

Limitation of what is said in.

What is said in an opinion of this court must be limited to the facts and issues involved in the particular record under investigation. *German Alliance Ins. Co.* v. *Home Water Co.*, 220.

ORIGINAL PACKAGES.

See CONSTITUTIONAL LAW, 2, 4.

PARTIES.

Misjoinder; when not reversible error.

Where the joinder of an executor of a party whose interest has ceased is simply a mistake, it is not reversible error. *Kalanianaole* v. *Smithies*, 462.

See ACTIONS, 1, 2, 3, 4; PRACTICE AND PROCEDURE, 19, 24–27;
APPEAL AND ERROR, 8; RESTRAINT OF TRADE, 45;
RIPARIAN RIGHTS, 3.

PATENTS.

License against positive prohibitions conferred by.

While rights conferred by patents are definite and extensive, they do not give a universal license against positive prohibitions any more than any other rights do. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

See RESTRAINT OF TRADE, 49.

PENALTIES AND FORFEITURES.

See STATES, 3.

PERIODICALS.

See MAILS, 4, 5, 6, 7.

PERISHABLE PROPERTY.

See SALES.

PHILIPPINE ISLANDS.

See APPEAL AND ERROR, 10;
TRADE-MARKS, 2.

PLEADING.

See CRIMINAL LAW, 5;
EMPLOYERS' LIABILITY ACT, 1, 3;
JURISDICTION, H 2;
RESTRAINT OF TRADE, 22.

POLICE POWER.

See CONSTITUTIONAL LAW, 8, 16, 18, 19, 24, 42, 43, 44;
COURTS, 9, 10, 11;
INTOXICATING LIQUORS, 1, 2;
STATES, 1–7.

PORTO RICO.

See EVIDENCE, 2;
JURISDICTION, H 2.

POSTMASTER GENERAL.

See CONTRACTS, 6;
COURTS, 7;
MAILS.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF;
ALIENS, 1;
CONSTITUTIONAL LAW, 1;
INTERSTATE COMMERCE, 1, 2, 3;
RAILROADS, 4;
RESTRAINT OF TRADE, 13.

PRACTICE AND PROCEDURE.

1. *As to controlling discretion of lower court.*

This court will be slow to control the discretion of the Supreme Court of Porto Rico as to a matter wholly within its power—such as sending a case back to the lower court for further opportunity to cross-examine. *Burnet* v. *Desmornes*, 145.

2. *As to review of discretion of trial court in allowing leading questions.*

Even if it is open, it will require a strong case to induce the appellate court to review the discretion of the trial court in allowing leading questions; in this case, the witness being a foreigner who seemingly did not understand the English language, there is no ground for revision. *Southwestern Brewery* v. *Schmidt*, 162.

3. *As to going behind decision of local court upon matter of local practice.*

This court will not go behind the decision of the Supreme Court of Territory upon a matter of local practice in order to reverse the judgment upon a technicality and an assumption contrary to a fact appearing in the record. *Ib.*

4. *Conclusiveness of findings of Secretary of the Interior and state court.*
Quære: Whether this court can go behind successive findings of the Secretary of the Interior and the state court that a lake was properly meandered and the lands within its area were not swamp. In this case no reason appears for so doing. *Marshall Dental Mfg. Co.* v. *Iowa*, 460.

5. *Following findings of state court.*
The decision by the state court that an article is within the prohibition of a state statute is binding here. *Purity Extract Co.* v. *Lynch*, 192.

6. *Following lower court's findings of fact.*
A finding by the Circuit Court of Appeals that the bankrupt had actual knowledge of the residence and address of the creditor is binding on this court. *Miller* v. *Guasti*, 170.

7. *Following lower courts' findings of fact.*
Conclusions as to facts reached by two lower courts will not be disturbed by this court unless manifestly erroneous. *Taylor* v. *Columbian University*, 126.

8. *Following concurrent findings of lower courts on questions of fact.*
The settled rule is that the concurrent action of two courts below upon questions of fact will not be disturbed except in case of manifest error. *First National Bank* v. *Littlefield*, 110.

9. *Following finding of lower courts as to failure to sustain burden of proof.*
In this case appellant being claimant below had the burden of proof, and this court will not reverse the finding of both courts that the burden was not sustained. *Ib.*

10. *Following ruling of lower court as to perishable nature of property sold.*
As to whether property is perishable or not, this court will follow the rulings of a territorial court in the absence of a strong reason to the contrary. *Jones* v. *Springer*, 148.

11. *Following state court's construction of state statute.*
In determining its validity this court must consider a municipal ordinance as it has been construed by the highest court of the State. *Williams* v. *Talladega*, 404.

12. *Following state court's construction of powers of state legislature and municipalities in establishing rates.*

This court is not prepared on the facts in this case to overrule the highest court of a State in construing the relative powers of the legislature and municipalities in establishing rates for water. *Murray* v. *Pocatello*, 318.

13. *Following state court's holding as to conformity with local practice.*

This court is bound to assume, in the absence of any general law or policy of a State to the contrary being shown, that where the court adjudges the proceedings to be in accord with proper practice that such is the case. *Thompson* v. *Thompson*, 551.

14. *Inference as to conflict between power of State and constitutional limitations not lightly to be indulged.*

A clash between the police power of the State and constitutional limitations will not be lightly inferred, but the exact point of contact cannot be determined by any general formula in advance. (*Hudson Water Co.* v. *McCarter*, 209 U. S. 349.) *Eubank* v. *Richmond*, 137.

15. *Mandate to Circuit Court of Appeals where that court had proceeded without jurisdiction.*

Where the Circuit Court of Appeals proceeds without jurisdiction this court should, on acquiring jurisdiction of the cause, remand it to the Circuit Court of Appeals with instructions to dismiss the appeal for want of jurisdiction. *443 Cans of Egg Product* v. *United States*, 172.

16. *Questions raised too late.*

Contentions as to unconstitutionality of a state statute not made in the court below cannot be made in this court. *Selover, Bates & Co.* v. *Walsh*, 112.

17. *Objection not raised below or assigned as error not available.*

An objection that the exception and demurrer did not comply with Rule 31 owing to failure to make affidavit that they were not interposed for delay, if not raised in the court below or assigned as error, cannot be raised in this court. *Wood* v. *Wilbert*, 384.

18. *Objection to constitutionality of state statute not considered when not raised below or covered by assignment of error.*

Whether a state law is unconstitutional as *ex post facto* by reason of the construction given it by the state court not considered in this case

because no such point was raised in the court below or covered by assignments of error in this court. *Rosenthal* v. *New York*, 260.

19. *Parties; following local practice in respect of.*
On a pure matter of form as to the parties in a suit coming here from a court of a Territory, and where the whole interest in a judgment sued upon was before that court, this court should not go behind the local practice. *Kalanianaole* v. *Smithies*, 462.

20. *Record; absence of final judgment from; effect on jurisdiction.*
Where the record does not contain the final judgment to which the writ of error is directed this court cannot assume that a judgment was entered and is without authority to exert jurisdiction. *Gersch* v. *Chicago*, 451.

21. *Scope of review of state legislation.*
This court cannot review the economics or facts on which the legislature of a State bases its conclusions that an existing evil should be remedied by an exercise of the police power. *Central Lumber Co.* v. *South Dakota*, 157.

22. *Scope of review in determining constitutionality of state statute.*
This court deals with the case in hand and not with imaginary ones; and if a state statute is constitutional as against the class to which the party attacking it belongs, it will not consider whether the same statute might be unconstitutional as applied to other classes not before the court. *Yazoo & M. V. R. R. Co.* v. *Jackson Vinegar Co.*, 217.

23. *Questions reviewable in proceeding for mandamus to restore petitioner to office over which court has no jurisdiction.*
In a proceeding specifically for mandamus to restore petitioner to a state office over which this court has no jurisdiction, it cannot consider any rights which petitioner may have in a fund of which he may be deprived without due process of law, and the judgment dismissing for want of jurisdiction does not conclude his rights in that respect. *Preston* v. *Chicago*, 447.

24. *Who may attack constitutionality of law.*
One not included in a class established by a police statute or who is not injuriously affected by the classification cannot be heard to attack the statute on the ground that the classification denies equal protection of the law. *Rosenthal* v. *New York*, 260.

25. *Who may attack constitutionality of statute.*
One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection by such discrimination. *Hatch* v. *Reardon*, 204 U. S. 152, followed, and *Spraigue* v. *Thompson*, 118 U. S. 90, distinguished. *Darnell* v. *Indiana*, 390.

26. *Who may attack constitutionality of statute.*
One not hurt by a provision of an act cannot raise the question of its constitutionality on that ground. *Pittsburg Steel Co.* v. *Baltimore Equitable Society*, 455.

27. *Duty of one assailing constitutionality of state police statute.*
The party assailing the constitutionality of a state police statute must clearly show that it offends constitutional guaranties in order to justify the court in declaring it invalid. *Eubank* v. *Richmond*, 137.

28. *When state statute changing remedy will not be declared unconstitutional.*
Where, as in this case, this court cannot say that the state court was wrong in holding the new remedy under a state statute to be more efficacious than the former remedy for enforcing claims of creditors of a corporation against the stockholders, it will not declare the statute unconstitutional. And so *held* as to Chap. 305, Laws of Maryland of 1908. *Pittsburg Steel Co.* v. *Baltimore Equitable Society*, 455.

29. *Ruling of state court in application of state statute not to be anticipated.*
Where the state court has construed a state law as applied to the case at bar, this court will presume that the state court will make the statute effective as so construed in other cases. This court will not anticipate the ruling of the state court. *Selover, Bates & Co.* v. *Walsh*, 112.

See APPEAL AND ERROR, 1;
CRIMINAL LAW, 3, 4;
JURISDICTION, A 8.

PREFERENCES.

See BANKRUPTCY, 3, 4, 5.

PRESCRIPTION.

See JURISDICTION, H 3.

PRESUMPTIONS.

As to ethics in foreign country.

Where it does not clearly appear to the contrary, this court will assume that the same principles of honesty and fairness prevail in Spain as in our own law. *Obeda* v. *Zialcita*, 452.

See CONSTITUTIONAL LAW, 28;
EMPLOYERS' LIABILITY ACT, 2;
PRACTICE AND PROCEDURE, 29.

PRINCIPAL AND AGENT.

See CONTRACTS, 5.

PRIVILEGES AND IMMUNITIES OF CITIZENS.

See CONSTITUTIONAL LAW, 39, 40.

PROCESS.

See CONSTITUTIONAL LAW, 37;
DIVORCE, 3, 4.

PRODUCTION OF BOOKS AND PAPERS.

See CONSTITUTIONAL LAW, 41.

PROHIBITION.

See COURTS, 6.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW.

PROSTITUTES.

See CONSTITUTIONAL LAW, 14;
COURTS, 8.

PROVISOS.

See STATUTES, A 3.

PUBLICATION, PROCESS BY.

See DIVORCE, 3, 4.

PUBLIC LANDS.

1. *Segregation; right of entryman to cut timber pending final determination that homestead entry void.*

Until it is finally determined that a homestead entry is void because

made on mineral land open to mining location under the act of June 3, 1878, the land is segregated from the public domain and the entryman cannot cut timber thereon in violation of the law applicable to homestead entries. *Bunker Hill Mining Co.* v. *United States*, 548.

2. *Estoppel of entryman from defending against violations of law.*
An entryman claiming rights of a homesteader is estopped from defending against violations of the law on the ground that under another statute the land is not open to homestead entry. *Ib.*

3. *Notice imputed to one buying from entryman lumber unlawfully cut.*
One buying from an entryman lumber cut in violation of law from the homestead does so with notice and is liable for the timber unlawfully removed by the entryman. *Ib.*

See PRACTICE AND PROCEDURE, 4;
RIPARIAN RIGHTS, 1, 2, 3.

PUBLIC MONEYS.

See ARMY AND NAVY, 2.

PUBLIC OFFICERS.

See CLAIMS AGAINST THE UNITED STATES; CONTRACTS, 3, 4, 5; FEDERAL QUESTION, 2; STATES, 1, 2.

PUBLIC POLICY.

See INTERSTATE COMMERCE, 22.

PUBLIC SERVICE CORPORATIONS.

See CONTRACTS, 10, 11, 12.

PURE FOOD AND DRUGS ACT.

1. *Seizure of goods; proceedings for; how action of lower court reviewable.*
The provision in § 10 of the Pure Food Act of June 30, 1906, 34 Stat. 768, c. 3915, that proceedings for seizure of goods shall be by libel and conform, as near as may be, to proceedings in admiralty, does not include appellate proceedings; the action of the District Court on the libel can only be reviewed as at common law by writ of error and not by appeal. *443 Cans of Egg Product* v. *United States*, 172.

2. *Proceedings under; intention of Congress.*
When Congress enacted the Pure Food Act it was known that as to seizures on land the District Court proceeded as in actions at common law. *Ib.*

3. *Proceedings under; jury trial; object of provision.*
The provision for jury trial in § 10 of the Pure Food Act was probably inserted by Congress with a view to removing any question of constitutionality of the act. *Ib.*

4. *Seizures under; right of owner of goods to hearing and review.*
While proceedings for seizure and condemnation under § 10 of the Pure Food Act are intended to be summary, the owner, as this court construes the statute, has a right to a hearing in a court of record, with a right of review upon questions of law by writ of error in the Circuit Court of Appeals, and where more than $1,000 is involved finally in this court under § 6 of the Circuit Court of Appeals Act. *Ib.*

5. *Jurisdiction of Circuit Court of Appeals to review action of District Court on libel.*
As the Circuit Court of Appeals had no jurisdiction to review the action of the District Court on a libel filed under the Pure Food Act, neither its own action thereon nor the consent of the parties could give such jurisdiction. *Ib.*

RAILROADS.

1. *Acquisitions by, of other roads; limitations upon.*
Although a railroad corporation may lawfully acquire that portion of another railroad which connects, but does not compete, with any part of its own system, it may not acquire the entire system a substantial portion of which does compete with its lines. *United States* v. *Union Pacific R. R. Co.*, 61.

2. *Acquisitions by, of other roads; determination of effect and legality under Anti-trust Act.*
The effect of such a purchase and its legality under the Sherman Law may be judged by what was actually accomplished, and the natural and probable consequences of that which was done. *Ib.*

3. *Discriminations by, contrary to acts of Congress under which constructed; power of courts to restrain.*
Doubtless courts could restrain one railroad constructed under the acts of July 1, 1862, and July 2, 1864, from making discriminations, contrary to the provisions of those acts in regard to interchange of traffic, against another railroad also constructed under those acts. *Ib.*

4. *Power of Congress over railroads constructed under Federal authority; good faith in management required; effect of changed forms of ownership and organization.*

The obligation to keep faith with the Government in regard to management of railroads constructed under acts of Congress continues notwithstanding changed forms of ownership and organization, as does also continue the legislative power of Congress concerning such railroads. *Ib.*

See INTERSTATE COMMERCE, 13, 14, 18;
INTERSTATE COMMERCE COMMISSION, 2, 3;
RESTRAINT OF TRADE.

RATES.

See CARRIERS, 2;
CONSTITUTIONAL LAW, 10;
INTERSTATE COMMERCE, 19–22;
PRACTICE AND PROCEDURE, 12.

REAL PROPERTY.

See APPEAL AND ERROR, 10;
CONSTITUTIONAL LAW, 18;
CONVEYANCES.

REBATES.

See INTERSTATE COMMERCE, 14, 15.

RECORD.

See APPEAL AND ERROR, 8;
PRACTICE AND PROCEDURE, 20.

REMEDIES.

See CONSTITUTIONAL LAW, 9, 11, 12, 13;
CONTRACTS, 17;
INTERSTATE COMMERCE, 23;
PRACTICE AND PROCEDURE, 28;
RESTRAINT OF TRADE, 7, 8, 9, 19, 40.

REMOVAL OF CAUSES.

Right of plaintiff to proceed in state court.

Where the case is not removable before trial, plaintiff has the right to have the issues of fact and law raised determined in the state court having jurisdiction, and the power of the state court to so determine cannot be destroyed by defendants' claim that if the evidence had been rightly weighed the decision would have been different. *Deming* v. *Carlisle Packing Co.*, 102.

REPEALS.

See STATUTES, A 4, 5.

RES JUDICATA.

1. *Effect of decision of court without jurisdiction.*

The decision of a court that has no jurisdiction of the subject-matter or the parties is not *res judicata*. *Robertson* v. *Gordon*, 311.

2. *Effect of judgment of dismissal for want of jurisdiction as res judicata on merits.*

A court which is not empowered to grant relief whatever the merits may be, cannot decide what the merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res judicata* on the merits. *Murray* v. *Pocatello*, 318.

3. *Effect on judgment, not otherwise res judicata, of reference to opinion in which views on merits expressed.*

Where the judgment cannot be *res judicata* on the merits because the court has no power to grant relief, it is not made *res judicata* by reference to the opinion in which the court expresses its views on the merits. *Ib.*

See PRACTICE AND PROCEDURE, 23.

RESTRAINT OF TRADE.

1. *Anti-trust Act; purpose of.*

The main purpose of the Sherman Anti-trust Act is to forbid combinations and conspiracies in undue restraint of interstate trade and to end them by as effectual means as the court may provide. *United States* v. *Union Pacific R. R. Co.*, 470.

2. *Anti-trust Act; comprehensiveness of.*

The character of the Sherman Act is sufficiently comprehensive and thorough to prevent evasions of its policy by disguise or subterfuge. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

3. *Anti-trust Act as limitation of rights.*

The Sherman Anti-trust Act is a limitation of rights which may be pushed to evil consequences and should therefore be restrained. *Ib.*

4. *Anti-trust Act; application to railroads.*

The Sherman Anti-trust Act of July 2, 1890, 26 Stat. 209, c. 647, applies to interstate railroads which are among the principal instrumen-

talities of interstate commerce. *United States* v. *Union Pacific R. R. Co.*, 61.

5. *Anti-trust Act; scope of and construction to be given.*
The Sherman Act is intended to reach and prevent all combinations which restrain freedom of interstate trade, and should be given a reasonable construction to this end. *Ib.*

6. *Anti-trust Act; agreements prohibited; effect of good intention of parties.*
The Sherman Act is its own measure of right and wrong; courts cannot declare an agreement which is against its policy legal because of the good intentions of the parties making it. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

7. *Anti-trust Act; relief under.*
In applying the general rules as to relief under the Sherman Law as declared in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, the court must deal with each case as it finds it; and where the combination has been effected by purchase by one corporation of a dominant amount of stock of its competitor the decree should provide an injunction against the right to vote stock so acquired, or payment of dividends thereon except to a receiver, and any plan for disposition of the stock should be such as to effectually dissolve the unlawful combination. *United States* v. *Union Pacific R. R. Co.*, 61.

8. *Anti-trust Act; relief under.*
Whether the decree can provide for the purchase by the Union Pacific of such portions of the Southern Pacific as are only connecting and are not competitive and which effect a continuous line to San Francisco, not now determined with leave to the District Court to consider any plan proposed to effect such results. *Ib.*

9. *Anti-trust Act; relief under.*
Unless plans for dissolution are presented to, and affirmed by, the District Court within a reasonable period, in this case three months, that court should proceed to dissolve the combination by receiver and sale. *Ib.*

10. *Anti-trust Act; disposition of case involving illegal combination; retention of jurisdiction by lower court.*
The decree below, dismissing the bill generally, being affirmed by this court as to all matters other than the purchase of Southern Pacific stock, is reversed in part and the District Court retains its jurisdiction over the cause to see that the decree outlined by this court in this opinion is made effectual. *Ib.*

11. *Anti-trust Act; suppression of competition prohibited by.*
The Sherman Law prohibits the creation of a single dominating control in one corporation whereby natural and existing competition in interstate trade is suppressed; such prohibition extends to the control of competing interstate railroads effected by a holding company as in the *Northern Securities Case* and to the purchase by one of two competing railroad companies of a controlling portion, even if not, as in this case, a majority of the stock of the other. *United States* v. *Union Pacific R. R. Co.*, 61.

12. *Anti-trust Act; prohibitions embraced by.*
The Sherman Law, in its terms, embraces every contract or combination in form of trust or otherwise or conspiracy in restraint of interstate trade. *Ib.*

13. *Anti-trust Act; supremacy of Congress; effect of act of corporation within corporate powers conferred by State.*
Congress is supreme over interstate commerce, and a combination which contravenes the Sherman Law is illegal although it may be permissible under, and within corporate powers conferred by, the laws of the State where made. *Ib.*

14. *Anti-trust Act; free competition the criterion in construction.*
Courts should construe the Sherman Law with a view to preserve free action of competition in interstate trade, which was the purpose of Congress in enacting the statute. *Ib.*

15. *Anti-trust Act; effect of subsequent on prior decisions as to construction.*
The opinions in *Standard Oil Co.* v. *United States* and *United States* v. *American Tobacco Co.*, 221 U. S. 1 and 106, contain no suggestion that the decisions of the court in the *Trans-Missouri* and *Joint Traffic Cases* were not correct in holding the combinations involved to be illegal while applying the rule that the statute should be reasonably construed. *Ib.*

16. *Civil and criminal actions under Anti-trust Act; procedure in bringing.*
There is no rule that civil suits brought under the Sherman Act to dissolve the combination must await the trial of criminal actions against the same defendants, and whether the trial of the civil action shall be delayed because some of the defendants refuse to testify as witnesses for other defendants is a matter in the discretion of the trial court, and in the absence of abuse, not reviewable. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

17. *Combinations; determination of validity.*

In determining the validity of a combination the court may look to the intent and purpose of those conducting the transaction and to the objects had in view. *United States* v. *Union Pacific R. R. Co.*, 61.

18. *Combinations; when ownership by corporation of less than majority of stock of another, illegal.*

While in small corporations a majority of stock may be necessary for control, in large corporations, where the stock is distributed among many stockholders, a compact united ownership of less than half may be ample to control and amounts to a dominant interest sufficient to effect a combination in restraint of trade within a reasonable construction of the Sherman Law. *Ib.*

19. *Combination to restrain competition in production, sale and transportation of coal.*

The United States filed a bill to enforce the provisions of the Sherman Anti-trust Act of July 2, 1890, against an alleged combination of railroad and coal mining companies formed to restrain competition in the production, sale and transportation in interstate commerce of anthracite coal. The bill alleged a general combination through an agreement between the carrier defendants to apportion the coal tonnage between themselves on a scale of percentages; a combination through the medium of one of the mining companies to prevent the construction of a new competing coal carrying road from the anthracite district to tide-water; a combination by a series of identical contracts with independent coal operators for sale of their total product; and certain contributory combinations between some but not all of the defendants. The bill was filed prior to the enactment of the Commodities Clause of the Hepburn Act of June 29, 1906. *Held* that:

Any relief against a continuance of the transportation of carrier owned coal under the Commodities Clause must be sought in a proceeding based upon that act and cannot be obtained in this suit.

On the record in this case, this court agrees with the court below that the Government has failed to show any contract or combination for the distribution of coal tonnage between themselves.

The defendants did combine to unreasonably restrain interstate commerce in violation of the Sherman Anti-trust Act through the Temple Iron Company to prevent the construction of the competing coal carrying railroad. *United States* v. *Reading Co.*, 324.

20. *Combination to restrain competition; power of court to dissolve.*

Although a combination has succeeded in accomplishing one of the

purposes for which it was formed, if it is still an efficient agency to prevent competition in other methods, the court may proceed to judgment and decree its dissolution. *Ib.*

21. *Combination; when separate acts of parties, legal under state law, become parts of illegal combination.*

Although separate acts of the defendants may be legal under the state law when considered alone, they may, when taken together, become parts of an illegal combination under the Anti-trust Act which it is the duty of the court to dissolve. *Ib.*

22. *Combination in; suit to restrain; scope of consideration by the court.*

In a suit to restrain all defendants from carrying out an illegal combination under the Sherman Act in which all defendants participated, the court will not consider minor combinations between less than all of the defendants which did not constitute part of the general combination found to be illegal. To do so would condemn the bill for misjoinder and multifariousness. *Ib.*

23. *Combination in; suit to restrain; action of court as to minor combinations involved.*

In this case the court expresses no opinion on such minor combinations and as to them the bill should be dismissed without prejudice. *Ib.*

24. *Combination in; effect on illegality of tendency for a time to stimulate competition.*

A combination otherwise illegal under the Anti-trust Act as suppressing competition, is not the less so because for a time it may tend to stimulate competition—and so held as to a corner in cotton. *United States* v. *Patten*, 525.

25. *Combinations; to what Anti-trust Act does not apply.*

The Anti-trust Act does not apply to a combination affecting trade or commerce that is purely intrastate, or where the effect on interstate commerce is merely incidental and not direct; but although carried on wholly within a State, if the necessary operation of a combination is to directly impede and burden the due course of interstate commerce, it is within the prohibition of the statute; and so held as to a corner in cotton to be run in New York City. *Ib.*

26. *Competition defined.*

Competition is the striving for something which another is actively seeking and wishes to gain. *United States* v. *Union Pacific R. R. Co.*, 61.

27. *Competition between transcontinental railway systems defined.*
Competition between two transcontinental railway systems such as the Union Pacific and Southern Pacific includes not only making of rates but the character of service rendered and accommodation afforded; and the inducement to maintain points of advantage in these respects is greater when the systems are independent than when the corporation owning one of the systems also dominates and controls the other. *Ib.*

28. *Competition; restraint of; what constitutes.*
The Union Pacific and Southern Pacific are competing systems of interstate railways and their consolidation by the control of the latter by the former through a dominating stock interest does, as a matter of fact, abridge free competition, and is an illegal restraint of interstate trade under the Sherman Law. *Ib.*

29. *Competition; restraint of; effect on illegality, of existence of non-competitive business of carriers.*
In this case *held*, that while there was a great deal of non-competitive business, a sufficiently large amount of competitive business was affected to clearly bring the combination made within the purview of the Sherman Law. *Ib.*

30. *Competition; restraint of; justification of; necessity of termini by carrier as.*
In this case also *held*, that the necessity of the Union Pacific to obtain an entrance to San Francisco and other California points over the lines of the Southern Pacific was not such as to justify the combination complained of in this case in view of the provisions for a continuous railroad to the Pacific Coast and for interchange of traffic without discrimination contained in the acts of July 1, 1862, 12 Stat. 489, 495, § 12, c. 120, and of July 2, 1864, 13 Stat. 356, 362, § 15, c. 216. *Ib.*

31. *Competition; power of law over.*
While the law may not compel competition, it may remove illegal barriers resulting from illegal agreements, such as those involved in this case, which make competition impracticable. *United States* v. *Reading Co.*, 324.

32. *Conspiracy to run corner in staple commodity illegal under Anti-trust Act.*
A conspiracy to run a corner in the available supply of a staple commodity which is normally a subject of interstate commerce, such

as cotton, and thereby to artificially enhance its price throughout the country, is within the terms of § 1 of the Anti-trust Act of July 2, 1890. *United States* v. *Patten*, 525.

33. *Contracts, in themselves innocent, as steps in plot to restrain trade.*
While no one of a number of contracts considered severally may be in restraint of trade, each of a series of innocent contracts may be a step in a concerted criminal plot to restrain interstate trade, and, if so, may thereupon become unlawful under the Anti-trust Act. (*Swift & Co.* v. *United States*, 196 U. S. 375.) *United States* v. *Reading Co.*, 324.

34. *Contracts; illegality of, under Anti-trust Act.*
In this case *held* that a series of identical contracts between interstate carriers with a great majority of the independent coal operators to market all the coal of the latter for all time at an agreed percentage of tide-water price were all parts of a concerted scheme to control the sale of the independent output and were unreasonable contracts in restraint of interstate trade within the prohibition of the Sherman Act. *Ib.*

35. *Contracts within prohibition of Sherman Act.*
While the Sherman Act does not forbid or restrain the power to make usual and normal contracts to further trade through normal methods, whether by agreement or otherwise, *Standard Oil Co.* v. *United States*, 221 U. S. 1, it does forbid contracts entered into according to a concerted scheme, as in this case, to unduly suppress competition and restrain freedom of commerce among the States. *Ib.*

36. *Dissolution of combinations; precedents not necessarily followed.*
Each case under the Sherman Act must stand upon its own facts and this court will not regard the methods provided in decrees of other cases as precedents necessarily to be followed where a different situation is presented for consideration. *United States* v. *Union Pacific R. R. Co.*, 470.

37. *Dissolution of combination; scheme disapproved.*
The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors; and this court will not approve a method of distributing stock of a railroad company held by a competitor so that the natural result will be that a majority of the governing boards of both roads shall consist of the same persons. *Ib.*

38. *Dissolution of combination; scheme disapproved.*
In this case it is not impossible under the plan proposed that this result will happen and therefore it is not approved. *Ib.*

39. *Dissolution of combination; considerations by court in forming decree.*
A court of equity dealing with an illegal combination should conserve the property interests involved, but never in such wise as to sacrifice the purpose of the statute. *Ib.*

40. *Dissolution of combination; scheme disapproved.*
Without precluding the District Court from considering all plans submitted as provided by the former opinion and the decree (*ante*, p. 61) this court now holds that a transfer of the stock of the Southern Pacific Company to the stockholders of the Union Pacific Railroad Company would not so effectually end the combination as to comply with the decree. *Ib.*

41. *Evidence; weight of, in proceeding to dissolve combination.*
A disclaimer on the part of defendants of power of any one of them to control business of the others cannot detract from the significance of documentary evidence bearing on the relations of the defendants to each other. *United States* v. *Reading Co.*, 324.

42. *Intent as test of reasonableness of acts; evidence of.*
Whether a particular act or agreement is reasonable and normal or unreasonable may in doubtful cases turn upon intent, and the extent of control obtained over the output of a commodity may afford evidence of the intent to suppress competition. *Ib.*

43. *Intent; when immaterial.*
Where there is no doubt that the necessary result of an act is to materially restrain trade between the States, intent is of no consequence. *Ib.*

44. *Involuntary restraints within § 1 of Anti-trust Act.*
Section 1 of the Anti-trust Act is not confined to voluntary restraints but includes involuntary restraints, as where persons not engaged in interstate commerce conspire to compel action by others or create artificial conditions, which necessarily affect and restrain such commerce. *United States* v. *Patten*, 525.

45. *Parties to illegal agreement; effect of inequality among.*
A party to an agreement in restraint of trade is none the less a party to the illegal combination created thereby, because it is not subject

to all the restrictions imposed upon all the other parties thereto. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

46. *Steps in plan to restrain trade; illegality of.*
Where, as in this case, purchase and delivery within a State is but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose, it is an interference with and restraint of interstate commerce. (*Loewe* v. *Lawlor*, 208 U. S. 274.) *United States* v. *Reading Co.*, 324.

47. *Stock purchase as; Union Pacific control of Southern Pacific illegal.*
The purchase by the Union Pacific Railroad Company of forty-six per cent of the stock of the Southern Pacific Company, with the resulting control of the latter's railway system by the former, is an illegal combination in restraint of interstate trade within the purview of the Sherman Anti-trust Act of 1890 and must be dissolved. *United States* v. *Union Pacific R. R. Co.*, 61.

48. *Trade agreement within prohibition of Anti-trust Act.*
A trade agreement under which manufacturers, who prior thereto were independent and competitive, combined and subjected themselves to certain rules and regulations among others limiting output and sales of their product and quantity, vendees and price, *held* in this case to be illegal under the Sherman Anti-trust Act of July 2, 1890. (*Montague* v. *Lowry*, 193 U. S. 38.) *Standard Sanitary Mfg. Co.* v. *United States*, 20.

49. *Trade agreement involving patent rights within prohibition of Anti-trust Act.*
A trade agreement involving the right of all parties thereto to use a certain patent, which transcends what is necessary to protect the use of the patent or the monopoly thereof as conferred by law and controls the output and price of goods manufactured by all those using the patent, is illegal under the Anti-trust Act of 1890. *Bement* v. *National Harrow Co.*, 186 U. S. 70, and *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, distinguished. *Ib.*

RETROSPECTIVE LAWS.
See CONSTITUTIONAL LAW, 35.

REVISED STATUTES.
See STATUTES, A 7.

RIPARIAN RIGHTS.

1. *Iowa law; effect on grants of United States.*

By the law of Iowa riparian owners take only to the water's edge and grants of the United States follow the state rule and convey no land under an unnavigable lake. *Marshall Dental Mfg. Co.* v. *Iowa*, 460.

2. *Title to bed of meandered lake formerly within public domain.*

The title to the bed of a meandered lake formerly within the public domain of the United States, for which no patent has been issued, either remains in the United States or has passed under the Swamp Land Act to the State. *Ib.*

3. *Title to bed of meandered lake; interest of State; right to maintain action against trespasser.*

Under such circumstances a State has, by virtue of its sovereignty, an interest sufficient to entitle it to maintain an action against one intruding without title. *Ib.*

RULES OF COURT.

Power of court under, dependent upon statute on which rule based.

The power which this court can exercise under one of its own rules depends upon the statute on which the rule is based. *Deming* v. *Carlisle Packing Co.*, 102.

See APPEAL AND ERROR, 3.

SALES.

1. *Effect of order to sell attached perishable property.*

An order to sell attached property on the ground that it is perishable is not one to enforce the lien of the attachment but one incidental to the preservation of the property, and the court having the custody has the jurisdiction to sell. *Jones* v. *Springer*, 148.

2. *Nature of proceeding to sell perishable property attached.*

A proceeding to sell perishable property is one *in rem* and the purchaser gets title against all the world. *Ib.*

See BANKRUPTCY, 3–6; CONSTITUTIONAL LAW, 22; FEDERAL QUESTION, 1; INTOXICATING LIQUORS, 1, 2; RESTRAINT OF TRADE, 48; STATES, 6.

SEARCHES AND SEIZURES.

See CONSTITUTIONAL LAW, 41.

SECOND CLASS MAIL MATTER.
See MAILS, 4, 5.

SECRETARY OF COMMERCE AND LABOR.
See CONSTITUTIONAL LAW, 14;
COURTS, 8.

SECRETARY OF THE INTERIOR.
See PRACTICE AND PROCEDURE, 4.

SEIZURES.
See PURE FOOD AND DRUGS ACT, 1, 4.

SELF-INCRIMINATION.
See CONSTITUTIONAL LAW, 41.

SETTLEMENT OF CLAIMS.
See STATES, 3.

SHERMAN ACT.
See RESTRAINT OF TRADE.

SIXTH AMENDMENT.
See ALIENS, 2;
CONSTITUTIONAL LAW, 14.

SPECIAL APPEARANCE.
See JURISDICTION, H 1.

STATES.

1. *Police power; discretion in exercise.*

A State is not required to go as far as it may in establishing a police regulation; the entire field of proper legislation need not be covered in a single act. *Rosenthal* v. *New York*, 260.

2. *Police power; what within.*

The making and selling of bread, particularly in large cities, is obviously a trade subject to police regulation. *Schmidinger* v. *Chicago*, 578.

3. *Police power to penalize delay in settlement of claims.*

It is within the police power of the State to provide by penalty for delay a reasonable incentive for prompt settlement without suit of

just demands of a class admitting of special legislative treatment; in this case of claims against common carriers for damage to goods shipped between two points within the State. *Yazoo & M. V. R. R. Co.* v. *Jackson Vinegar Co.*, 217.

4. *Police power; necessity for exercise in respect of sales of bread.*
The fact that laws prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes have been sustained by the courts of several States shows the necessity for police regulation of the subject. *Schmidinger* v. *Chicago*, 578.

5. *Police power; invalidity of exercise not to be determined by inconvenience occasioned.*
Mere inconvenience to merchants conducting a business subject to police regulation does not vitiate the exercise of the power. *Ib.*

6. *Power to prevent destruction of competition by regulating discriminatory sales.*
Regulating discriminatory sales made within the State for the purpose of destroying competition is within the legislative power of the State unless the statute conflicts with the Constitution of the United States. *Central Lumber Co.* v. *South Dakota*, 157.

7. *Power to suppress existing evil without covering entire field.*
The legislature of a State may direct its police regulations against what it deems an existing evil without covering the whole field of possible abuses. It may direct a law for the protection of trade in accord with its policy against one particular instrument of trade war. *Ib.*

8. *Taxation of corporations by.*
A State may tax the property of domestic corporations and the stock of foreign ones in similar cases. (*Kidd* v. *Alabama*, 188 U. S. 730.) *Darnell* v. *Indiana*, 390.

9. *Taxation of Federal agency without power of.*
An agency of the Federal Government in the execution of its sovereign power is not subject to the taxing power of the State. *Williams* v. *Talladega*, 404.

See CONSTITUTIONAL LAW, 8, 18, 19, 24, 42–46;
INTERSTATE COMMERCE, 2, 3, 4, 5, 17;
INTOXICATING LIQUORS, 1, 2;
JURISDICTION, H 4;
RIPARIAN RIGHTS, 3;
TELEGRAPH COMPANIES, 2.

STATUTE OF LIMITATIONS.

See EMPLOYERS' LIABILITY ACT, 3;
JURISDICTION, H 2.

STATUTES.

A. CONSTRUCTION OF.

1. *Amendments; presumption against conflict.*

This court will assume that all the amendments to different parts of the same act of Congress passed at the same time were intended not to conflict but to be in accord as provisions for different situations. *Wood* v. *Wilbert*, 384.

2. *Legislation incorporated into act not to be destroyed by construction under assimilation clause.*

A statute will not be so construed under an assimilation clause as to destroy legislation which Congress incorporated into the act after having it called to its attention. *Hannum* v. *United States*, 436.

3. *Provisos; effect to be given.*

A rational interpretation will be given to a statute and a *proviso* and not one by which the statute will, through the *proviso*, destroy itself. *Adams Express Co.* v. *Croninger*, 491.

4. *Repeals; effect of general law on special remedial statute.*

Unless the repeal be express or the implication to that end be irresistible, a general law does not repeal a special statutory provision affording a remedy for specific cases. (*Petri* v. *Creelman Lumber Co.*, 199 U. S. 487.) *Ex parte United States*, 420.

5. *Repeals; effect of Judicial Code on Expedition Act of 1903.*

The special provisions of the Expedition Act of February 11, 1903, 32 Stat. 823, c. 544, requiring in a particular class of cases the organization of a court constituted in a particular manner, were not repealed by the Judicial Code of 1911. *Ib.*

6. *Reports of committees of Congress; reference to.*

In order to construe the statute and make the redress as complete as Congress intended, reports of the committees of both houses having the matter in charge may be referred to. *McLean* v. *United States*, 374.

7. *Revised Statutes; effect of re-arrangement of section on meaning of original act.*

The subdivision and rearrangement of § 22 of the Judiciary Act of

1789 in the Revised Statutes of 1873 did not work any change in the purpose and meaning of the original act. *Bucks Stove Co.* v. *Vickers*, 205.

8. *How state statute for prevention of monopoly to be read.*
Where the highest court of a State has construed a statute as aiming at the prevention of a monopoly in a commodity by means likely to be employed and prohibited by the statute, this court should read the statute as having ultimately in view the benefit of buyers of the goods. *Central Lumber Co.* v. *South Dakota*, 157.

9. *Of act giving a right.*
An act of Congress will not be construed as giving a right and taking it away at one and the same instant; nor will the conditions making it necessary be made a reason for defeating it. *McLean* v. *United States*, 374.

10. *Whether statute unconstitutional in part would be invalid in toto; quære as to.*
Quære, and not now to be decided, whether the statute now sustained as constitutional as against the party attacking it would be void *in toto* if unconstitutional as against other classes who have not yet attacked it. *Yazoo & M. V. R. R. Co.* v. *Jackson Vinegar Co.*, 217.
See ARMY AND NAVY, 1; JURISDICTION, A 5, 6; FEDERAL QUESTION, 3; RESTRAINT OF TRADE.

B. STATUTES OF THE UNITED STATES.
See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.
See LOCAL LAW.

STOCK AND STOCKHOLDERS.
See RESTRAINT OF TRADE, 7, 18, 47.

SWAMP LAND ACT.
See RIPARIAN RIGHTS, 2.

TAXES AND TAXATION.
See CONSTITUTIONAL LAW, 5, 7, 34, 45, 46;
STATES, 8, 9;
TELEGRAPH COMPANIES, 2.

TAXPAYERS.
See ACTIONS, 3, 4.

TELEGRAPH COMPANIES.

1. *Corporate rights and privileges; derivation of.*

The corporate rights and privileges were derived from the laws of the State of incorporation. *Williams* v. *Talladega*, 404.

2. *Taxation by State; effect of act of 1866.*

The permission given by the act of 1866 does not prevent a State from taxing the real or personal property of a telegraph company within its borders or from imposing a license tax upon the right to do a local business within the State. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, distinguished. *Ib.*

3. *Use of military and post roads; scope of privilege given by act of 1866.*

The privilege given telegraph companies under the act of July 24, 1866, to use military and post roads of the United States for poles and wire, was permissive and did not create corporate rights and privileges to carry on the business of telegraphy. *Ib.*

See CONSTITUTIONAL LAW, 45.

TERRITORIAL COURTS.

See APPEAL AND ERROR, 12;

TIMBER CUTTING.

See PUBLIC LANDS, 1, 3.

TITLE.

See BANKRUPTCY, 3; EJECTMENT;
CONVEYANCES, 3; RIPARIAN RIGHTS, 2;
SALES, 2.

TORTS.

See CONTRACTS, 10.

TRADE AGREEMENTS.

See RESTRAINT OF TRADE, 48, 49.

TRADE-MARKS.

1. *Infringement; right to restrain.*

One, whose registered trade-mark is manifestly an imitation of an earlier but unregistered trade-mark, cannot restrain a third party from using it. *Obeda* v. *Zialcita*, 452.

2. *Philippine act; right of recovery under.*
The Philippine Trade-mark Act expressly denies the right of one fraudulently using a trade-mark to recover. *Ib.*

3. *Fraudulent registration; effect of § 13 of Treaty with Spain of 1898.*
Section 13 of the Treaty with Spain of 1898, protecting industrial property in the ceded territory, will not be construed as contravening principles of morality and fairness and as protecting a trade-mark fraudulently registered prior to the treaty. *Ib.*

4. *Imitation of unregistered mark; use a fraud on public.*
Even if a trade-mark be not registered, if it be well known, it is an imposition on the public to use an imitation of it. *Ib.*

5. *Certificate; conclusiveness of.*
Even if a statute makes a certificate of trade-mark conclusive, it must be taken subject to the general principle of law embodied in the statute to the effect that trade-marks fraudulently adopted are not protected. *Ib.*

TRADES AND CALLINGS.
See CONSTITUTIONAL LAW, 16, 25–29;
STATES, 2, 5.

TREATIES.
See EXTRADITION;
TRADE-MARKS, 3.

TRESPASS.
See RIPARIAN RIGHTS, 3.

TRIAL BY JURY.
See CONSTITUTIONAL LAW, 14.

TRUSTS.
See RESTRAINT OF TRADE;
WILLS.

VENDOR AND VENDEE.
See CONSTITUTIONAL LAW, 18;
CONVEYANCES, 4.

WATERS.
See RIPARIAN RIGHTS.

WILLS.

1. *Charitable trust created by; validity of.*

A devise and bequest to a university to establish an endowment fund for free education of young men for preparation for entrance to the United States Naval Academy or to fit them to become mates or masters in the Merchant Marine Service of the United States, *held* in this case to create a charitable trust that is capable of execution and one which is not void as too indefinite for execution. *Taylor* v. *Columbian University*, 126.

2. *Charitable trust; validity of; failure of parties.*

Where testator names one institution to carry out a trust and names another as alternate in case the former shall not be able to perform, the court will not declare the trust impossible of execution on account of the failure of the first-named institution to carry it out until after the second named has also tried and failed. *Ib.*

3. *Charitable trust; definiteness in meaning of words used.*

In establishing an educational endowment fund the words "Merchant Marine Service of the United States" have a definite meaning sufficient to sustain the trust. *Ib.*

WILSON ACT.

See INTOXICATING LIQUORS, 4.

WITNESSES.

Immunity; quære as to.

Quære, whether one of the individual defendants in an equity case brought by the Government to dissolve an illegal combination under the Sherman Act, called as a witness by one of the other defendants in the same suit, obtains immunity from criminal prosecution as to the matters testified to. *Standard Sanitary Mfg. Co.* v. *United States*, 20.

See PRACTICE AND PROCEDURE, 2.

WORDS AND PHRASES.

All.

The word "all" excludes the idea of limitation. *McLean* v. *United States*, 374.

"*All back pay and emoluments*" as used in act of Congress for relief of officer of Army (see Army and Navy, 3). *McLean* v. *United States*, 374.

"*Every court within the United States*" as used in § 905, Rev. Stat. (see Courts, 2). *Thompson* v. *Thompson*, 551.
"*Merchant Marine Service of the United States*" as used in will (see Wills, 3). *Taylor* v. *Columbian University*, 126.
"*Periodicals*" as used in act of March 3, 1879 (see Mails, 6). *Smith* v. *Hitchcock*, 53.

WRIT AND PROCESS.

See APPEAL AND ERROR;
CONSTITUTIONAL LAW, 37;
DIVORCE, 3, 4.

WRITTEN INSTRUMENTS.

See EVIDENCE, 2.

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